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Customary International Law, Forcible Abductions, and America's Return to the "Savage State"

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Customary International Law, Forcible Abductions, and America's Return to the "Savage State"

DOUGLAS J. SYLVESTER*

Introduction.....	556
I. <i>United States v. Alvarez-Machain</i>	558
II. The Court's Misapplication of Precedent.....	561
A. Applicability of the Treaty.....	562
1. <i>Ker v. Illinois</i>	562
2. <i>Alvarez-Machain's</i> Misapplication of <i>Ker</i>	563
B. Violation of the Treaty.....	565
1. <i>United States v. Rauscher</i>	565
2. <i>Alvarez-Machain's</i> Misapplication of <i>Rauscher</i>	567
C. Due Process.....	570
1. <i>Frisbie v. Collins</i>	570
2. <i>United States v. Toscanino</i>	571
3. <i>Alvarez-Machain</i> and Due Process.....	573
III. The Relevance of Customary International Law.....	574
A. Forcible Abductions as Violations of Customary International Law.....	575
1. Violation of State Sovereignty.....	577
2. Violation of Individual Rights.....	579
B. Customary International Law in the United States.....	580
1. The Case of <i>The Paquete Habana</i>	580
2. <i>The Paquete Habana's</i> Unfortunate Legacy.....	582
IV. The Courts' Deferential Stance.....	585
A. Broad Extra-Constitutional Powers.....	586
1. The Federal Government Generally.....	586
2. The Executive Particularly.....	589
B. The Political Questions Doctrine.....	593
C. Summary.....	596
V. The Historic Application of Customary International Law ...	597
A. The Law of Nations in Common Law England and Early America.....	597
B. The Law of Nations and Article III.....	601

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VI. Problems Facing a Modern Application of Customary

International Law.....	602
A. Historical Factors.....	603
1. Tradition of Non-Application.....	603
2. Early Political Disputes	605
3. The Rise of Positivism	608
4. The Growth of American Power.....	611
5. Countervailing Historical Developments.....	612
B. Theoretical Arguments	613
1. Lack of Democratic Legitimacy.....	613
2. Absence of Judicial Restraint	616
3. Countervailing Arguments	619
Conclusion	620

INTRODUCTION

*The law of nations, being the common law of the civilized world, may be said, indeed, to be a part of the law of every civilized nation . . . [T]his universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.*¹

The United States of America is now an outlaw nation, and there is nothing that the Supreme Court is willing to do about it. This ugly state of affairs has been brought about, in great part, by the 1992 Supreme Court decision in *United States v. Alvarez-Machain*.²

In that decision, the Supreme Court held that United States courts are not stripped of personal jurisdiction over a defendant, even when the defendant is a foreign citizen, and his presence in the U.S. has been obtained through a governmentally sponsored forcible abduction. Although the decision rested on strict adherence to ancient and dubious precedent, coupled with convoluted treaty interpretation, the Court's conclusion ultimately forced it to ignore the international law implications of such abductions, and conclude that it was powerless to stop the executive branch from violating international law.

In essence, the Supreme Court refused to apply international law in a case which cried out for it. Instead, the Court merely declared that "the decision of whether respondent should be returned to Mexico . . . is a matter for the Executive Branch."³ The executive branch, for its part, elected to continue acting outside internationally sanctioned behavior, and refused to return Alvarez-Machain to Mexico.

1. Henfield's Case, 11 F. Cas. 1099, 1122 n.6 (C.C.D. Pa. 1793) (No. 6,360) (quoting Peter Duponceau, Attorney for Henfield).

2. 112 S. Ct. 2188 (1992).

3. *Id.* at 2196.

The Court's refusal to apply customary international law as a means to invalidate illegal executive branch action is, unfortunately, not surprising. Instead, *Alvarez-Machain* merely represents the culmination of executive branch attempts to disentangle itself from the restraining bonds of international prohibitions.⁴ Although *Alvarez-Machain* may be attacked for its poor treaty interpretation, or for its misuse of precedential support,⁵ it is its failure to apply customary international law as a barrier to governmental impropriety that is most reprehensible. Because of this failure, *Alvarez-Machain* may soon come to represent the supreme judicial precedent authorizing the executive branch to violate customary international law. For this reason, the holding in *Alvarez-Machain*, and the historical beliefs and barriers which allowed the Court to reach such an immoral and dangerous conclusion, must be reexamined. Part I of this Article will review the factual background of the *Alvarez-Machain* decision and discuss the holding of the Court. Part II will critically examine the domestic precedents upon which the decision was founded. In so doing, it will show that these precedents did not require the decision that the Court reached.

Part III will establish that the abduction of *Alvarez-Machain* did in fact violate customary international law, but will note that courts in the United States have become reluctant to apply that law against the executive. Part IV will place the courts' reluctance in the context of broad historical trends of jurisprudence. Part V will establish that, despite these trends, United States courts were originally intended to apply and enforce customary international law. Finally, Part VI will address and refute some of the major theoretical arguments against a modern judicial application of customary international law.

In the end, this Article will argue that customary international law should be applied domestically against the executive, because to do so is consistent with history and with the Constitution, and is in the long-term international best interests of the United States.

4. See *The Legality as a Matter of Domestic Law of Extraterritorial Enforcement Activities That Depart From International Law*, in *FBI Authority to Seize Suspects Abroad: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 9 (1989) (Statement of William Barr, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice) [hereinafter *Extraterritorial Enforcement Activities*]; *The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 22 (1989) (Statement of Abraham Sofaer, Legal Advisor for the United States Department of State) [hereinafter *International Law*].

5. See *United States v. Alvarez-Machain*, 112 S. Ct. at 2197-206 (Stevens, J., dissenting).

I. UNITED STATES V. ALVAREZ-MACHAIN

On February 7, 1985, Drug Enforcement Agent Enrique (Kiki) Camarena-Salazar was kidnapped outside the American consulate in Guadalajara, Mexico. His mutilated and obviously tortured body was found one month later.⁶ Although it was widely known that Camarena's murder had been carried out by members of a Latin American drug cartel, the Mexican government was unable to satisfy the United States that it intended to convict those responsible.⁷

6. The 1985 kidnapping, torture, and subsequent murder of Drug Enforcement Agency Special Agent Enrique (Kiki) Camarena-Salazar has been a source of extensive litigation. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992); *Matta-Ballesteros ex. rel. Stolar v. Henmen*, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990).

For a more extensive discussion of the facts surrounding Camarena-Salazar's murder, see *Storm Arises over Camarena: U.S. Wants Harder Line Adopted*, *LATIN AM. WKLY. REP.*, Mar. 8, 1985, at 10; see also ELAINE SHANNON, *DESPERADOES, LATIN DRUG LORDS, U.S. LAWYERS, AND THE WAR AMERICA CAN'T WIN* (1989); *Drug Wars: The Camarena Story* (NBC television broadcast, Jan. 7-9, 1990).

For a series of scholarly works that are highly critical of the government's actions in this area, see H. Moss Crystle, *When Rights Fall in a Forest ... The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture*, 9 *DICK. J. INT'L L.* 387 (1991); Jonathan Gentin, *Government Sponsored Abduction of Foreign Criminals Abroad: Reflections on United States v. Caro-Quintero and the Inadequacy of the Ker-Frisbie Doctrine*, 40 *EMORY L.J.* 1227 (1991); Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 *AM. J. INT'L L.* 655 (1991); Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 *AM. J. INT'L L.* 712 (1990).

However, not every scholar disagreed with government sponsored abductions of foreign criminals. See Ruth Wedgwood et al., *Extraterritorial Jurisdiction—Applicability of Constitutional Restraints to U.S. Officials Acting Abroad—Searches by U.S. Officials of Alien-Owned Premises in Foreign Country*; *United States v. Verdugo-Urquidez*, 84 *AM. J. INT'L L.* 747 (1990); Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 *DUKE L.J.* 867 (1992); Mitchell J. Matorin, Note, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 *DUKE L.J.* 907 (1992).

7. See *Mexico's President Comes Calling*, 132 *CONG. REC.* 11,462 (1986) (statement of Sen. Hawkins):

The thing that rankles me most about Mexico is how it pussyfoots around on the subject of drug trafficking and corruption in high places. Drug dealers operate with impunity, without the slightest fear that they will be caught. And if they are unlucky enough to be caught in one of the occasional nets Mexican authorities cast from time to time, nothing ever happens. They are never prosecuted. They are released with at most a slap on the wrist.

Id.

Senator Hawkins' pessimism has proven to be premature. The Mexican government, in its amicus brief to the Supreme Court, declared that:

Mexican authorities commenced a criminal investigation in 1985 into the kidnapping and murder of DEA agent of Enrique Camarena Salazar and Alfredo Zavala Avelar. Warrants of arrest were issued for Rafael Caro Quintero, Ern-

Among those the United States felt were responsible was Dr. Humberto Alvarez-Machain.⁸

Alvarez-Machain was suspected by the DEA of administering life-sustaining treatment to Camarena, thereby preserving him for further interrogation and torture. As a result, the United States moved quickly to indict Alvarez-Machain for conspiracy to commit violent acts in furtherance of an enterprise engaged in racketeering activity,⁹ felony murder,¹⁰ conspiracy to kidnap a federal agent,¹¹ kidnap of a federal agent,¹² and for being an accessory after the fact.¹³

In December 1989, agents of the DEA met with Mexican authorities to discuss the possibility of exchanging Alvarez-Machain

esto Fonseca Carrillo, and others in the state of Jalisco (Guadalajara) on charges of illegal deprivation of freedom in the form of abduction, homicide, and various narcotics offenses. They were charged with the offenses named on September 19, 1989, and were tried and convicted on December 12, 1989. The court imposed the maximum penalty on both defendants, viz., 40 years imprisonment, various fines, and forfeiture of properties. The convictions were affirmed on appeal on August 10, 1990 by the Third District Criminal Court of the State of Jalisco. Nine of their principal associates were also convicted and sentenced for their complicity in the offenses.

In addition, Caro Quintero, Fonseca Carrillo and twenty-one of their associates were convicted and sentenced in the Federal District (Mexico City) for narcotics offenses, firearms offenses, criminal association and illegal deprivation of freedom offenses. In that case, Caro Quintero was sentenced to a separate 34-year prison term and Fonseca Carrillo was sentenced to a separate 11-1/2 year term. Their twenty-one associates received sentences ranging from 12-1/2 to 14-1/4 years, plus fines and forfeitures.

A third person, believed to be a principal in the Camarena case, Miguel Angel Felix Gallardo, has also been arrested and is being tried, together with nine of his associates, in the Federal District (Mexico City) for various narcotics trafficking, firearms and bribery charges. They have been in custody since April 1989.

Brief for the United Mexican States as Amicus Curiae in Support of Affirmance at n.24, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712), available in LEXIS, Genfed Library, Briefs file.

From the preceding it becomes clear that the United States' opposition to Alvarez-Machain's repatriation to Mexico for the reason that "immunizing a defendant from all prosecution is too high a price to pay for an illegal arrest" is not based in fact. See Brief for the United States at 17, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712).

8. Rene Martin Verdugo-Urquidez and Juan Ramon Matta-Ballesteros were also kidnapped and brought to the United States for trial. For a discussion of these abductions, see Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991).

9. 18 U.S.C. § 1959 (1988).

10. 18 U.S.C. §§ 1111(a), 1114 (1988).

11. 18 U.S.C. § 1201(c) (1988).

12. 18 U.S.C. § 1201(a)(5) (1988).

13. 18 U.S.C. § 3 (1988).

for a Mexican, Isaac Naredo Moreno, who was being held in the United States. The swap was to be made immediately after the Christmas holiday. Unfortunately, when the time came, Mexican authorities demanded an additional \$50,000 before they would make the exchange. The DEA refused, and the deal fell through. At this point, the DEA began making plans to abduct Alvarez-Machain from his home in Mexico.

The DEA decided it would hire former members of the Mexican police to kidnap Alvarez-Machain and deliver him to United States authorities in Texas. As an inducement, the DEA offered a reward of \$50,000 for the abduction and delivery.¹⁴ Finally, the plan was approved by the Deputy Director of the DEA and the United States Attorney General's Office.¹⁵

In the Spring of 1990, Dr. Alvarez-Machain had just finished treating a patient when several armed men burst into his office and, placing a gun against his head, ordered him to "cooperate or die." Alvarez-Machain was driven to Leon, Mexico, quickly put on a plane, and flown to El Paso, Texas. Upon landing, he was forced off the plane and promptly arrested by United States federal authorities.¹⁶

In the end, the plan to abduct Alvarez-Machain cost the DEA a total of \$25,000 in reward payments to the mercenaries who carried out the kidnapping. The DEA also brought seven of the individuals involved, and their families, to the United States, paying all of the abductors' expenses, including living expenses, incurred during their flight from Mexican authorities. All of this was done to protect these "agents" of the United States government from lawful prosecution by Mexican authorities for the kidnapping of a Mexican citizen in Mexican territory.¹⁷

Soon after arriving in the United States, Alvarez-Machain challenged his indictment, arguing principally that his abduction was in clear violation of the extradition treaty between Mexico and the United States.¹⁸ The district court agreed and ordered that Alvarez-Machain be returned to Mexico.¹⁹ The Ninth Circuit Court of

14. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd sub nom.*, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

15. *Id.*

16. *See id.* at 599-604; *see also* Gentin, *supra* note 6, at 1227.

17. All of the above facts are taken from the statement of facts as provided in the Brief for the United States, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712).

18. The Treaty of Extradition Between the United States and Mexico, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

19. *United States v. Caro-Quintero*, 745 F. Supp. at 614.

Appeals affirmed the district court's decision,²⁰ relying on its earlier holding in *United States v. Verdugo-Urquidez*.²¹

On July 15, 1992, the Supreme Court struck down the decision of the Ninth Circuit,²² declaring that "[t]he fact of respondent's forcible abduction does not . . . prohibit his trial in a court in the United States for violations of the criminal laws of the United States."²³

The Court considered three relevant factors before determining that Alvarez-Machain's abduction did not divest the courts of jurisdiction. First, it looked to *Ker v. Illinois* to find support for its conclusion that the manner in which a defendant is brought before a court does not dispossess the court of jurisdiction. Second, it reconciled Alvarez-Machain's abduction with the existing extradition treaty. Finally, it implicitly held that any customary international law prohibition against forcible abductions is a matter for the executive branch, and does not constitute a proper issue for judicial determination.

In reality, the Court did not adequately address the range of issues raised by Alvarez-Machain's kidnapping. A deeper analysis of the cases and law discussed in the Court's opinion demonstrates the inadequacy of the decision and makes clear that the Court's opinion should be criticized on two levels. First, the domestic precedent upon which the Court relies does not fully support the decision's conclusions. Second, and most important, the majority's refusal to apply customary international law, and its implicit endorsement of the power of the executive branch to violate that law, is immoral, anti-historical, and incompatible with the long-term international interests of the United States.

II. THE COURT'S MISAPPLICATION OF PRECEDENT

The Court's opinion in *Alvarez-Machain* rests largely on its interpretation of two earlier Supreme Court decisions: *United States v. Rauscher* and *Ker v. Illinois*, decided by the Court on the same day in 1886. Put simply, the Court interpreted the two cases to mean the following: *Rauscher* stands for the principle that a court has no jurisdiction over a defendant brought before it in violation of a treaty, while *Ker* espouses that where no treaty is violated, due process does

20. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

21. 939 F.2d 1341 (9th Cir. 1991). Judge Rafeedie felt that the earlier holding in *Verdugo-Urquidez* was dispositive of Alvarez-Machain's case. In particular, Judge Rafeedie was swayed by the fact that a valid extradition treaty was in place and that the offended country (Mexico) had protested the abduction, thus allowing Alvarez-Machain to raise the treaty as a defense. *United States v. Alvarez-Machain*, 946 F.2d at 1466.

22. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2197 (1992).

23. *Id.* at 2196.

not bar trial of a defendant whose presence has been secured by force, even if illegally.

Following these interpretations, the Court stated: "If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it."²⁴ However, in using this reading, the Court actually misapplied both *Ker* and *Rauscher*, failing to distinguish the former, and erroneously distinguishing the latter. It then compounded its error by failing to hold, or even to consider the argument, that the rule of *Ker* is obsolete in light of more recent developments in due process jurisprudence.

A. *Applicability of the Treaty*

1. *Ker v. Illinois*. *Ker v. Illinois* involved the forcible abduction and repatriation to the United States of Frederick M. Ker, an American citizen who had fled to Peru after embezzling from a bank in Chicago.²⁵ Henry G. Julian, a Pinkerton agent, was sent to take custody of Ker from the Peruvian government in compliance with an official extradition treaty between the two countries.²⁶ Julian, however, never contacted the Peruvian government²⁷ and instead forcibly abducted Ker from his home. Ker was transported to Illinois where he was promptly convicted of embezzlement.²⁸

Upon appeal to the Supreme Court, Ker put forward two principal arguments: first, that his abduction and treatment violated his due process rights; and second, that the abduction was in contravention of the extradition treaty between the United States and Peru, and that the extradition treaty was the only legitimate means of obtaining his presence from Peru. Since his presence was secured outside of the procedures outlined in the treaty, Ker argued that the Court had no legal jurisdiction over him.²⁹

The Supreme Court rejected Ker's due process argument in cursory fashion, noting simply that his trial in Cook County Criminal Court had met the necessary due process requirements of the Constitution.³⁰ The Court also rejected Ker's appeal to the treaty,

24. *Id.* at 2193.

25. *Ker v. Illinois*, 119 U.S. 436, 438 (1886).

26. *Id.* at 437-39. The treaty had been signed on Sept. 12, 1870, and had entered into force on July 27, 1884. See Crystle, *supra* note 6, at 391 n.35.

27. Julian's failure to contact the Peruvian government may be explained by the fact that when he arrived in Lima, the Peruvian government had been overthrown by Chile's armed forces. See Editorial Comment, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953).

28. *Ker v. Illinois*, 119 U.S. at 437-39.

29. *Id.* at 438-40.

30. *Id.* at 440 (stating that Ker "ha[d] a trial according to the forms and modes pre-

holding that, because his abduction was carried out beyond its scope, the treaty was not applicable, and he could not invoke its protection.³¹ According to the Court, a private abduction, performed without the consent of the United States government, lay completely outside the provisions and reach of the treaty.³²

The Court refused to find sufficient governmental participation despite the fact that the Pinkerton agent was sent by the Secretary of State, and the prisoner's transport to the United States was carried out aboard a United States naval vessel.³³ Instead, the Court upheld its jurisdiction over Ker and affirmed the ability of the judiciary to try individuals brought to this country through kidnappings.

2. *Alvarez-Machain's Misapplication of Ker*. In reaching the same conclusion, the majority in *Alvarez-Machain* failed to examine the factual dissimilarity of their case to the case presented in *Ker*.

scribed for such trials, and [was] deprived of no rights to which he [was] lawfully entitled."). For further discussion of the due process issue, see *infra* part II.C.

31. However, in *United States v. Rauscher*, decided on the same day as *Ker*, the Court held that a defendant could invoke a treaty if he had been abducted under authority of the state and if the offended state protests the abduction. 119 U.S. 407, 430-31 (1886).

32. The Court found that although Julian had the papers necessary to procure the extradition of Ker pursuant to the treaty, Julian never presented them to the government of Peru. *Ker v. Illinois*, 119 U.S. at 442-43.

It should be noted that Ker's attorney took the somewhat novel, and perhaps misguided, approach of attempting to persuade the Court that the extradition treaty between the United States and Peru entitled Ker to asylum and "a right to be free from molestation for the crime committed in Illinois." *Id.* at 441. The Court declared that "[t]he right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum." *Id.* at 442.

Perhaps if Ker's attorney had been versed in the intricacies of international law and treaty interpretation, we might never have been confronted with the absurd decision in *Ker v. Illinois*. Perhaps if a more reasoned analysis of international law and treaty interpretation could have been offered to the Court, the Justices would have had to consider the validity of such arguments. Instead, the Court merely dismissed the "asylum" argument as being an "absurdity," and thus avoided deciding any real issues of international law. *See id.*

Another important point is that if Peru had objected to Ker's abduction, or had been willing to grant him asylum, then the outcome of the case may have been very different. For cases where the courts have been willing to find such a distinction, see *United States v. Rauscher*, 119 U.S. 407 (1886); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981); *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980); *Stevenson v. United States*, 381 F.2d 142 (9th Cir. 1967).

For scholarly attention to this area, see Edwin M. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 AM. J. INT'L L. 444 (1990); Crystle, *supra* note 6.

33. *Ker v. Illinois*, 119 U.S. at 438-40.

Although *Ker* declared that the extradition treaty between Peru and the United States was inapplicable, this decision was based on a significant fact that is missing in *Alvarez-Machain*: the government of the United States did not carry out *Ker's* abduction.³⁴

In *Ker*, the Supreme Court was swayed, in large part, by the fact that

although Julian went to Peru with the necessary papers to procure the extradition of *Ker* under the [extradition] treaty, those papers remained in his pocket and were never brought to light in Peru . . . [N]o steps were taken under them; and . . . Julian, in seizing upon the person of *Ker* and carrying him out of the territory of Peru in to the United States, did not act or profess to act under the treaty. In fact, the treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.³⁵

Using this factual determination, the Court then declared that "in invoking the jurisdiction of this Court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right."³⁶ According to the *Ker* Court, the treaty was not applicable because the United States government had not been involved in the kidnapping. Since the treaty was binding only between the governments of the United States and Peru, it could not be invoked as protection against actions unauthorized by the government.³⁷

The United States government's participation in *Alvarez-Machain's* abduction was comprehensive and undeniable. Although the Court's interpretation of *Ker* makes this fact irrelevant, if the Court had read *Ker* as applying only to non-governmental abductions, thus keeping in line with modern due process jurisprudence, the majority in *Alvarez-Machain* would have been forced to examine the legality of forcible abductions as a matter of principle, instead of purely an issue of *stare decisis*. At the least, such a factual dissimilarity should have precluded the Court's perfunctory determination that *Ker* was directly applicable to the situation in *Alvarez-Machain*.

34. *Id.* at 438.

35. *Id.* at 442-43 (emphasis added).

36. *Id.* at 443.

37. This reading of *Ker* was not followed by the Second Circuit in *United States v. Sobell*, 244 F.2d 520, 525 (2d Cir. 1957), which found no factual distinction between *Ker* and the case of a defendant who, like *Alvarez-Machain*, was kidnapped from Mexico by agents of the United States government. However, the *Sobell* court also failed to consider the crucial distinction between authorized and unauthorized action.

B. Violation of the Treaty

The Court's discussion of whether the extradition treaty had been violated centered around *United States v. Rauscher*.³⁸ Although *Rauscher* did not involve an issue of forcible abduction, it did examine the consequences of governmental violations of extradition treaties.³⁹

1. *United States v. Rauscher*. In *Rauscher*, the Court faced the case of an English sailor who had been extradited to the United States on a charge of murder.⁴⁰ After the extradition, however, Rauscher was charged not with murder, but rather with assault and administering cruel and unusual punishment.⁴¹ Upon arriving in the United States, Rauscher challenged the validity of the indictment on the grounds that the charges were different from those upon which he had been extradited. Justice Miller, writing for the Court, looked to international law to find that Rauscher's objections were correct. Since Rauscher was not charged with the crime for which he had been extradited, the Court ordered his release.

In so doing, the Court discussed the doctrine of "specialty," under which a person who is extradited may only be tried for the charge for which he was extradited.⁴² This doctrine was not explicit

38. 119 U.S. 407 (1886).

39. Chief Justice Rehnquist declared:

Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty, and proceedings against a defendant brought before a court by means of a forcible abduction. We addressed the former issue in *United States v. Rauscher*.

United States v. Alvarez-Machain, 112 S. Ct. 2188, 2191 (1992) (citations omitted).

40. The treaty in question was signed in 1842. One of its provisions declared that fugitives would be extradited in "certain cases" which included murder but not assault or cruel and unusual punishment. Treaty to Define Boundaries, for the Suppression of the Slave Trade, and for the Giving up of Criminals, Aug. 22, 1842, U.S.-U.K., 8 Stat. 572, 576.

41. *United States v. Rauscher*, 119 U.S. at 409.

42. Under the treaty, an obligation to extradite a prisoner arose only after he was formally charged with a crime specifically enumerated in the treaty. Further, a judge or magistrate of the extraditing country could examine the evidence and decide if it was strong enough to merit extradition. *Id.* at 420-21.

For more detailed discussion of the doctrine of specialty, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 475-78 cmt. f (1987); MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 13-2-2 (1990); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (2d rev. ed. 1987); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988); Jacqueline A. Weisman, Comment, *Extraordinary Rendition: A One-way Ticket to the U.S. ... Or is it?*, 41 CATH. U. L. REV. 149 (1991); Kenneth E. Levitt, Note, *International Extradition, the Principle of Specialty, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017 (1992); Christopher J. Morvillo, Note, *Individual Rights and the*

in the treaty, but the Court reasoned that it was implicit:

[It] has been attempted to be maintained [that since] there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, . . . he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself.⁴³

The *Rauscher* doctrine was affirmed in *Cook v. United States*, which involved the interpretation of a prohibition-era treaty.⁴⁴ Defendants argued that their presence had been secured through a seizure in violation of a treaty between Great Britain and the United States, and that they should therefore be released.⁴⁵ The Court agreed.

In keeping with the principle of *Rauscher*,⁴⁶ the *Cook* Court held that the existence of a treaty specifically prohibiting the gov-

Doctrine of Specialty: The Deterioration of United States v. Rauscher, 14 FORDHAM INT'L L. J. 987 (1991).

43. *Rauscher*, 119 U.S. at 422. "It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law [doctrine of specialty]" *Id.* at 429.

44. *Cook v. United States*, 288 U.S. 102, 107 (1933). During Prohibition, it was suspected that British vessels loaded down with liquor and liquor-making ingredients were mooring themselves just off the United States coast. There, they would be met by smugglers who would bring the materials into the United States in violation of Prohibition laws. Cook's British-registered vessel was seized when the Coast Guard intercepted it cruising off the coast of Massachusetts, and discovered liquor on board. *Id.* at 107-08.

45. *Id.* at 109-10.

46. The Court declared:

The Government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties

It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government The doctrine is not applicable here The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States" Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws.

Id. at 120-21 (citations omitted).

ernment's action necessitated a withdrawal of jurisdiction.⁴⁷ The Court withdrew jurisdiction not because the government lacked the power to arrest the individuals under normal circumstances, but rather because by signing a treaty the government had imposed a limitation upon its own authority.⁴⁸

Rauscher and *Cook* clearly enunciated the doctrine that the United States government may not profit from its own violation of international treaties, and that courts therefore may not invoke jurisdiction over individuals brought before them by means which violate such treaties.⁴⁹

2. *Alvarez-Machain's Misapplication of Rauscher*. In both *Rauscher* and *Cook*, the Court looked beyond the specific express provisions of the treaties involved, and emphasized the need to maintain the *spirit* of the treaties as well.

In *Rauscher*, the Court found in the explicit procedural safeguards of the treaty a reason for finding an implied use of specialty.⁵⁰ To decide otherwise, the Court held, would violate "the *fair purpose*"⁵¹ of the treaty. Similarly, the Court in *Cook* declared that

47. *Id.* at 121-22 ("To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.").

48. The court declared that:

The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority.

Id. at 121.

49. See Martin B. Sipple, *The Wild, Wild Western Hemisphere: Due Process and Treaty Limitations on the Power of United States Courts to Try Foreign Nationals Abducted Abroad by Government Agents*, 68 WASH. U. L.Q. 1047 (1991).

50. "[T]he treaty not only provides that the party shall be charged with one of the crimes mentioned, . . . but that evidence shall be produced [which] according to the law of [the host] country would justify the apprehension and commitment for trial of the person so charged." *Rauscher*, 119 U.S. at 421.

51. *Id.* at 423 (emphasis added). The Court also vehemently rejected the argument that implied provisions could not be read into the Treaty:

No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the *absence of express restriction* in the treaty of the right to try him for other offences than that for which he was extradited, is met by *the manifest scope and*

"[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the *purpose and effect* of the Treaty."⁵² Thus, in both *Rauscher* and *Cook*, the Court clearly employed a broad intentionalist, rather than a narrow literalist, interpretation of the treaties.

Chief Justice Rehnquist's opinion in *Alvarez-Machain* overlooks the underlying tenets of these precedential decisions. Although Rehnquist recognized that the reading of the doctrine of specialty into the *Rauscher* treaty was done by "implication,"⁵³ he declared that

to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In *Rauscher*, the implication of a doctrine of specialty into the terms of the Webster-Ashburton Treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of the Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.⁵⁴

Thus, the Court decided that because no express provision of the treaty prohibited abduction then such an action did not violate the treaty. Chief Justice Rehnquist viewed *Rauscher* and *Cook* as representing instances where specific violations of treaties occurred, and hence chose to look for such specificity in *Alvarez-Machain*.⁵⁵ Consequently, jurisdiction over *Alvarez-Machain* was held to be valid, the true import of *Rauscher* notwithstanding.

The dissent took issue with Chief Justice Rehnquist's interpretation of international law. Justice Stevens explained Rehnquist's misconstruction:

Although the Court's conclusion in *United States v. Rauscher* was supported by several judicial precedents, the holdings in these cases were not nearly as uniform as the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor. It is shocking to believe that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of

object of the treaty itself.

Id. at 422 (emphasis added).

52. *Cook*, 288 U.S. at 121-22 (emphasis added).

53. *Alvarez-Machain*, 112 S. Ct. at 2196.

54. *Id.*

55. *Id.* at 2195-97.

citizens in the other party's territory.⁵⁶

Justice Miller in *United States v. Rauscher*, in order to find a violation of the doctrine of specialty, drew upon accepted norms of international practice and the logical consistency of requiring a party to a treaty to abide by the "spirit" of the document.⁵⁷ Not only is such a search of the norms of international practice logically consistent with the problem facing the Court in *Rauscher*, finding such a violation in that case was far less obvious than a similar finding would have been in *Alvarez-Machain*.⁵⁸ Nevertheless, Rehnquist asserted that "only the most general of international law principles"⁵⁹ support the proposition that forcible abductions are inherently violative of extradition treaties.

The failure of the Court to interpret the actions of the government in light of the purpose of the treaty and the general principles of state practice is inconsistent with precedent. The Supreme Court, only seven years earlier, had held that it had the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."⁶⁰ It is difficult to reconcile the decision of *Alvarez-Machain* with this maxim.⁶¹

56. *Id.* at 2201 & n.20 (Stevens, J., dissenting) (footnotes omitted) (citing, *inter alia*, The Charter of American States, Art. 17, Apr. 30, 1948, 2 U.S.T. 2394, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607; The United Nations Charter, June 26, 1945, 59 Stat. 1031).

57. Britain objected to the fact that Rauscher had originally been indicted on a charge of murder and not a charge of assault or infliction of cruel and unusual punishment. *Rauscher*, 119 U.S. at 409. Thus, Britain's objection was obviously made for purposes of legal argumentation. However, in *Alvarez-Machain*'s case, the Mexican government did not argue some intricate legal point. Instead, it forcefully maintained the position that an extradition treaty is intended to protect the sovereignty of the signatory powers, and that the abduction of *Alvarez-Machain* was in violation of the entire purpose of treaties in general, and of extradition treaties in particular. *Alvarez-Machain*, 112 S. Ct. at 2193-94.

58. See *infra* part V.

59. *Alvarez-Machain*, 112 S. Ct. at 2196.

60. *Air France v. Saks*, 470 U.S. 392, 399 (1985) (holding that, under the terms of the Warsaw Convention, an airline was not liable for an injury to its passenger on an international flight).

61. This is given further validation when it is taken into account that the Mexican government had filed a number of diplomatic protests, and had indicted all those involved in the kidnapping. The published decision of *United States v. Alvarez-Machain* chronicles the following actions taken by the Mexican government following the abduction of *Alvarez-Machain*:

On April 18, 1990, Mexico requested an official report on the role of the United States in the abduction, and on May 16, 1990 and July 19, 1990, it sent diplomatic notes of protest from the Embassy of Mexico to the United States Department of State. In the May 16th note, Mexico said that it believed that the abduction was "carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty

The Rehnquist opinion in *Alvarez-Machain*, if followed, effectively eliminates treaty interpretation. If we are to look only at the specific provision of the treaty, and are forbidden to infer terms consistent with the spirit of it, then virtually no interpretive faculties may be employed.⁶²

To avoid allowing the United States to violate the spirit of extradition treaties, possible courses of action for states include the drafting of new treaties that are not capable of such ill-considered interpretations. Such treaties could include specific provisions outlawing the practice of forcible abduction, or detailed preambles declaring the purposes of the treaty. Both are possible practical responses to the problems of *Alvarez-Machain*. Although such "quick-fix" methods would have desirable effects, using them would amount to implicit endorsement of the literalist decision of *Alvarez-Machain*.

C. Due Process

Even in the absence of a finding that the treaty was violated, the prosecution of *Alvarez-Machain* should have been barred on due process grounds. Although *Ker* and some later cases have held that forcible abduction for prosecution does not violate due process, this holding is inconsistent with the modern meaning of the Due Process Clause as it has been interpreted in related contexts. However, the Court did not even address the possibility that *Ker's* time had passed, and that it should be overruled.

1. *Frisbie v. Collins*. The holding of *Ker*, that United States courts are not divested of jurisdiction over a defendant "for mere irregularities in the manner in which he may be brought into the

in force between the two countries," and in the July 19th note, it requested the provisional arrest and extradition of the law enforcement agents allegedly involved in the abduction.

Alvarez-Machain, 112 S. Ct. at 2197 (Stevens, J., dissenting) (citations omitted).

62. Rehnquist does seem willing to allow implied provisions to be found, but only if it can be shown that the practice of states is to specifically find such a provision in all treaties of the same nature. *Id.* at 2195-96.

Another point of significant interest is the disingenuous nature of Rehnquist's opinion. He repeatedly claims that it is beyond the power of the Court to find that the treaty prohibits all means of seizure of individuals that are not expressly provided for in the text, saying at one point that "to infer from this Treaty and its terms that it prohibits *all* means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice." *Id.* at 2196 (emphasis added). Rehnquist's use of the phrase "all means" is indicative of the way he presents his argument. He fails to address the point that the case at issue does not involve the ability of the United States to "gain[] the presence of an individual," rather, it merely declares that to gain the presence of that individual through a forcible abduction is in violation of the treaty. This is an important distinction which Rehnquist has either overlooked or purposely ignored.

custody of the law,⁶³ was reaffirmed and expanded sixty-six years later in the case of *Frisbie v. Collins*.⁶⁴ In *Frisbie*, the defendant had been tried and convicted of murder by the courts of Michigan. However, in a federal habeas corpus petition, he insisted that the manner in which he had been brought before the Michigan courts was in violation of his constitutional right to due process. He argued that his conviction should be overturned, and that he should be released.⁶⁵

Collins, while residing in Chicago, had been accosted by several members of the Michigan police. The officers handcuffed and beat him before transporting him back to Michigan to stand trial for murder.⁶⁶ The Supreme Court held that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"⁶⁷

Thus, the original holding of *Ker v. Illinois* was expanded to include purely domestic incidents of governmental kidnapping. Even though *Frisbie* is a domestic case, the two cases are almost always referred together as comprising the *Ker-Frisbie* doctrine. This doctrine has been "a staple of U.S. jurisprudence for over 100 years and has emerged relatively unscathed from a series of attacks,"⁶⁸ even though it has met with considerable criticism and several attempts to limit its applicability.⁶⁹

2. *United States v. Toscanino*. Attempts to limit the scope of *Ker-Frisbie* have been largely unsuccessful. However, *United States v. Toscanino*⁷⁰ represents the most powerful exception to the universal application of *Ker-Frisbie*.

63. *Ker v. Illinois*, 119 U.S. 436, 440 (1886).

64. 342 U.S. 519 (1952).

65. *Id.* at 519-20. Collins also argued that the Federal Kidnapping Act, 18 U.S.C. § 1202 (1988), enacted after the *Ker* decision, prohibited a kidnapping similar to the one at issue in *Ker*. The Court disagreed. *Frisbie v. Collins*, 342 U.S. at 522-23.

66. *Id.* at 520-25.

67. *Id.* at 522 (citation omitted). Strangely, the Court did not view this as a case involving the protections of the Fourth Amendment. Jonathan Gentin argued that the decision in this case was intended to limit the scope of the "exclusionary rule" enunciated in *McNabb v. United States*, 318 U.S. 332 (1942). See Gentin, *supra* note 6, at 1234-35.

68. Matorin, *supra* note 6, at 910.

69. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 rep. note 2, § 433 cmt. b (1987); Richard Downing, *The Domestic and International Legal Implications of the Abduction of Criminals From Foreign Soil*, 26 STAN. J. INT'L L. 573 (1990); Gentin, *supra* note 6; Levitt, *supra* note 42; Darin A. Bifani, Comment, *The Tension Between Policy Objectives and Individual Rights: Extradition, Abduction, and United States v. Verdugo-Urquidez*, 41 BUFF. L. REV. 627 (1993). But see Matorin, *supra* note 6; William M. Smith, *Camarena Case: A Place U.S. Can Draw the Line*, HOUSTON CHRON., Oct. 27, 1992, at A13; Weisman, *supra* note 42.

70. 500 F.2d 267 (2d Cir. 1974).

Toscanino, an Italian citizen, had been indicted for conspiracy to import narcotics into the United States. He alleged that the United States government, without making any attempt to gain control of him through legal or political channels, had arranged to have him kidnapped from his home in Montevideo, Uruguay. He claimed to have been lured from his home by United States government agents, then knocked unconscious by seven assailants and thrown into the back of a car. From there, he said, he was transported to Brasilia, where he was subjected to grotesque treatment and incessant torture.⁷¹

The *Toscanino* court noted that "[f]or years [*Ker and Frisbie*] have been the mainstay of a doctrine to the effect that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him."⁷² However, it declared that, if *Toscanino* had in fact been treated as he alleged, "the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*."⁷³ The court reasoned that the *Ker-Frisbie* concept of due process is contradicted by that expressed in more recent cases, which hold that due process "protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary unlawfulness on its part."⁷⁴ Where there is such a contradiction, the court held, "the *Ker-Frisbie* version [of due process] must yield."⁷⁵

71. *Id.* at 267-70. *Toscanino* alleged that his torment lasted approximately seventeen days, during which he was fed intravenously in amounts intended to just barely keep him alive. He further claimed that during interrogations

his fingers were pinched with metal pliers; [a]lcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage [A]gents of the United States government attached electrodes to [his] earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time

Id. at 270.

72. *Id.* at 275.

73. *Id.*; see also *Gentin*, *supra* note 6, at 1237-38. *Gentin* also argues that the Second Circuit created this exception because of the expanded role of the Fourth Amendment as it applied to the states, and because of "the Supreme Court's expansion of the concept of due process." *Id.* at 1237 (quoting *United States v. Toscanino*, 500 F.2d at 275). Although this is certainly the theoretical basis upon which the court relied, the moral issue seems equally important.

74. *United States v. Toscanino*, 500 F.2d at 275. The court cites *Rochin v. California*, 342 U.S. 165 (1952) (setting aside conviction on grounds that police violated suspect's due process rights when they pumped his stomach to obtain swallowed evidence); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that illegally obtained evidence must be excluded in state court proceedings); *Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that confession obtained subsequent to an illegal arrest was "tainted" and therefore inadmissible).

75. *Toscanino*, 500 F.2d at 275.

Although the principles underlying the decision in *Toscanino* go far in returning the United States' forcible abduction jurisprudence to a level of moral acceptability, the case has ultimately had the unfortunate effect of limiting any other attempts to impose moral requirements into this area of the law. It is precisely the fact that *Toscanino's* abduction and subsequent torture were so shocking that has hampered the case's applicability as a bar to *Ker-Frisbie*. Because the facts were so outrageous, courts have been particularly reluctant to declare any other case to be shocking enough to rise to its level.

Subsequent cases have limited *Toscanino* by declaring that mere forcible kidnapping, without evidence of torture or other such barbarous conduct, does not rise to the level of "shocking the conscience."⁷⁶ In the end, *Toscanino* has failed to overturn the holdings of *Ker-Frisbie*, and decisions such as *Alvarez-Machain* continue to hold that forcible abductions do not divest the courts of jurisdiction.

3. *Alvarez-Machain and Due Process*. The Court in *Alvarez-Machain* used the following analysis:

[O]ur first inquiry must be whether the abduction of the respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.⁷⁷

Although the Court mentions that its "first inquiry" concerns the violation of the extradition treaty, the logic of the decision proves otherwise. In fact, the Court made a preliminary, and unspoken, determination that "the rule in *Ker*" was fully applicable to *Alvarez-Machain*.⁷⁸ By accepting the applicability of this "rule," the Court's "first inquiry" became, in effect, its only inquiry. The Supreme Court not only passed up an opportunity to overrule *Ker-Frisbie*, but also gave it a strong and lasting endorsement.

Instead, the Court should have recognized those cases as what

76. See, e.g., *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) (holding that mere governmental kidnapping, without allegations of torture, was not shocking to the conscience), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605 (C.D. Cal. 1990) (holding that the allegations of mistreatment did not "constitute acts of such barbarism as to warrant dismissal of the indictment"), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

77. *Alvarez-Machain*, 112 S. Ct. at 2193.

78. Even Justice Stevens, dissenting, felt that *Ker-Frisbie* was still a viable tool for deciding cases. He argued only that the majority misinterpreted the treaty. *Id.* at 2198-206. As for *Ker*, Stevens merely distinguished the facts of *Alvarez-Machain* from it, *id.* at 2197, 2203, but made no mention of *Ker's* illegitimacy.

they are, "an archaic remainder of an era before the constitutional regulation of criminal law enforcement."⁷⁹ Rather than simply assume their validity, and thereby implicitly let *Toscanino* stand as a narrowly drawn "exception" to their rule,⁸⁰ the Court should have embraced the reasoning of *Toscanino*, and held that under the modern view of due process, the government may not secure a defendant for prosecution through illegal kidnapping, whether the particular tactics used are "cruel, inhuman and outrageous,"⁸¹ or merely "deliberate, unnecessary and unreasonable."⁸² Such a decision would have done much to enhance the moral stature of the United States. Instead, we are left with a powerful endorsement of *Ker-Frisbie*, and an expansion of its application.

Even if an explicit overruling of *Ker-Frisbie* was unlikely,⁸³ the facts of *Alvarez-Machain* provided the Court with an opportunity to greatly limit the applicability of *Ker-Frisbie*. At the least, the Court could easily have held that the *Ker-Frisbie* rule is inapplicable in cases of governmental abduction, or in cases where the offended state protests the abduction. All this would have been unnecessary, however, had the Court not refused to apply the most important, and theoretically most applicable, avenue of relief—customary international law.

III. THE RELEVANCE OF CUSTOMARY INTERNATIONAL LAW

The Court only briefly addressed the issue of whether the abduction of Dr. Alvarez-Machain was in violation of international law, and if so, whether that violation required his repatriation to Mexico. Although the Court was willing to concede that "[r]espondent and his *amici* may be correct that respondent's abduction was 'shocking,' and that it may be in violation of general international law princi-

79. Jonathan A. Bush, *How Did We Get Here?: Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 964 (1993).

80. The district court held that the circumstances of the abduction of Dr. Alvarez-Machain "do not constitute acts of such barbarism as to warrant dismissal of the indictment" under the terms of the "exception" delineated in *Toscanino* and its progeny. *United States v. Caro-Quintero*, 745 F. Supp. 599, 605 (C.D. Cal. 1990) (citing, *inter alia*, *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992). The Supreme Court, however, did not discuss even the existence of an exception to *Ker-Frisbie*, let alone hold that it is large enough to swallow the rule.

81. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

82. *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974).

83. See Bush, *supra* note 79, at 964-65 (discussing the unlikelihood of *Ker* being overruled).

ples,"⁸⁴ it said that it was powerless to rectify such violations, stating simply that "the decision of whether respondent should be returned to Mexico . . . is a matter for the executive branch."⁸⁵

In fact, extraterritorial forcible abductions violate the most basic definitions and perceptions of state sovereignty and individual rights under customary international law. However, as the decision in *Alvarez-Machain* demonstrates, the judiciary has historically been unwilling to apply this law against the executive. Such unwillingness, this Article will argue, directly conflicts with the theoretical and historical underpinnings upon which the judiciary was created, and frustrates broader United States interests.

A. *Forcible Abductions as Violations of Customary International Law*

International law concerns the "conduct of nation-states and their relations with other states, and to some extent also with their relations with individuals, business organizations, and other legal entities."⁸⁶ Article 38(1) of the Statute of the International Court of Justice enumerates the sources of international law:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) international custom, as evidence of a general practice accepted as law;
- c) . . . general principles of law recognized by civilized nations;
- d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.⁸⁷

84. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992) (citation omitted).

85. *Id.*

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1990). But see Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986) (arguing that international law deals with "the body of rules governing the relations of nation states").

87. *Statute of the International Court of Justice*, 1977 I.C.J. Acts & Docs. No.3, at 77. The Restatement lists the sources of international law as follows:

- (1) A rule of international law is one that has been accepted as such by the international community of states
 - (a) in the form of customary law;
 - (b) by international agreement; or
 - (c) by derivation from general principles common to the major legal systems of the world.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1989). The Restatement, unlike the Statute, lists customary international law before treaty law. This is interesting to note because of the continuing debate in the United States over the hierarchical status of different forms of international law. See generally Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273

Treaty law is the most easily ascertained, and is, in this country, the most readily accepted form of international law.⁸⁸ This is so for two reasons. First, treaties are written agreements between consenting state parties that create shared and binding obligations,⁸⁹ as such they fall within traditional positivistic notions of legitimate forms of law. Second, the place of treaties in the domestic system is enumerated in the Constitution, giving the judiciary a clear foundation for making legal determinations.

Customary international law consists of duties and privileges of states that can be discerned from an understanding of normative state practice, which is followed out of a sense of mutual obligation.⁹⁰ State practice does not need to be uniform; however, it is generally understood that it must be "widespread" and "should reflect wide acceptance."⁹¹

Finally, "general principles" of international law "have never expressly [been] referred to" by the International Court of Justice,⁹² and do not, in themselves, create obligations between states. Therefore, "their traditional role in international law is consequently small."⁹³

Treaty and customary law both create obligations on the part of states in their international relations, whereas general principles of law do not create such obligations. Of these three areas of international law, customary law provides the greatest possibilities for universal application. Customary law, unlike treaty law, is binding upon nations regardless of whether they have expressly accepted its application.⁹⁴ However, customary international law is not binding on a state that expressly rejects the principle during its formation.⁹⁵

The decision in *Alvarez-Machain* demonstrates the judiciary's lack of understanding of international law. Particularly, Justice Rehnquist's statement that forcible abductions may be "in violation of general international law principles" belies the Court's unfamiliarity

(1974-75).

88. See U.S. CONST. art. III (making treaties the supreme law of the land).

89. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1989) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.").

90. "Customary international law results from a general and consistent practice of states followed by them, from a sense of legal obligation." *Id.*

91. *Id.* at §102 cmt. b.

92. Howard S. Schrader, Comment, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 756 (1982).

93. *Id.*

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. b (1989).

95. *Id.* § 102 cmt. d.

with customary international law.⁹⁶ An examination of the applicable standards of customary law demonstrates, without dispute, that forcible abductions violate far more than "principles;" they violate *customary international law*.⁹⁷

1. *Violation of State Sovereignty.* The accepted principle that "law enforcement officers cannot arrest [fugitives] in another state . . . [without] that state's consent"⁹⁸ clearly indicates the current state of customary international law towards forcible abductions. This principle was given its most explicit endorsement in the United Nations Security Council's unanimous condemnation of the abduction of Adolf Eichmann by Israel.⁹⁹

Other international bases which could be invoked to nullify forcible abductions include the United Nations Charter and the Charter of the Organization of American States. Both of these documents require respect for territorial boundaries by all signatory nations. Thus, an abduction carried out without the consent of the host country would violate the customary norms of territorial respect contained in these documents.¹⁰⁰

The Second Circuit admitted as much when it noted in dicta that if a nation objected to the abduction of an individual within its territory, then the territorial provisions of the U.N. Charter and O.A.S. Charter could be invoked.¹⁰¹ Mexico, for its part, immediately objected to Alvarez-Machain's abduction, filed a number of diplomatic protests, and indicted all those involved in the kidnapping.¹⁰²

96. Justice Rehnquist uses the term "general principles" repeatedly in his opinion. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992).

97. The principles enunciated in the sections to follow have all risen to the level of customary international law, and the United States has not dissented from the proscriptions contained in these documents.

98. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) cmt. b (1987).

99. See Question Relating to the Case of Adolf Eichmann, S.C. Res. 138, U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960). Israel kidnapped Eichmann from his home in Argentina. Even given the nature of Eichmann's crimes, the Security Council still voted 8-0 in favor of condemning Israel's action. The Security Council declared that abductions, "if repeated, [may] endanger international peace and security," and requested that Israel make reparations to Argentina. *Id.*

100. See U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."); O.A.S. CHARTER art. 15 ("No State . . . has the right to intervene, directly or indirectly . . . in the internal or external affairs of any other State."); *id.* at art. 17 ("The territory of a State is inviolable . . .").

101. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); see also Downing, *supra* note 69, at 589 n.93.

102. The Mexican government, in a diplomatic note issued May 16, 1990, declared:
As a consequence of [the kidnapping], which violate[s] both the Mexican

However, Justice Rehnquist chose, even in the face of this Mexican response, to ignore the possible applicability of the Charters, and their principles of territorial and sovereign respect.

International reaction to the decision was equally swift and critical. The governments of Canada, Colombia, Uruguay, Jamaica, Argentina, Bolivia, Brazil, Chile, and Paraguay joined in condemning the abduction as violative of international law.¹⁰³ These criticisms resulted in a declaration by the Inter-American Juridicial Committee of the Organization of American States, which stated that the Court in *Alvarez-Machain* "ignores the fundamental principle of international law, namely, respect for the territorial sovereignty of states."¹⁰⁴

Further, the United Nations amended the Convention Against Illicit Traffic in Narcotics to include a declaration that all state parties "shall not undertake in the territory of another party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."¹⁰⁵

[sic] Constitutional Law, as well as International Law, the corresponding Mexican authorities have already initiated a criminal action proceedings [sic] in accordance with mexican [sic] law, against the intellectual and material perpetrators [sic] of the illegal kidnapping and transfer to the United States of Dr. Humberto Alvarez Machain, because it is deemed that in such a case, the crimes of kidnapping, false imprisonment and criminal association were committed. . . .

The Embassy of Mexico, upon specific instructions from its Government, requests . . . that Dr. Humberto Alvarez Machain be returned back to Mexico . . .

Brief for the United Mexican States as Amicus Curiae in support of Granting Review at 5a-6a, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712).

103. The Canadian minister of external affairs told the Canadian Parliament that any attempt by the United States to kidnap a Canadian would be regarded as a criminal act. David O. Stewart, *The Price of Vengeance: U.S. Feels Heat for Ruling that Permits Government Kidnapping*, A.B.A.J., Nov. 1992, at 50. The Colombian government issued a statement declaring that the *Alvarez-Machain* decision "threatens the legal stability of [all] public treaties." *Id.* A resolution adopted by the lower house of the Parliament of Uruguay asserted that *Alvarez-Machain* evinces "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties." *Id.* Jamaica's Minister of Security denounced the decision as "an atrocity that would disturb the world order." *Id.* The governments of Argentina, Bolivia, Brazil, Chile, and Paraguay, in a Joint Statement to the Organization of American States, requested a review of the *Alvarez-Machain* decision. *Id.*

104. *Id.* The Committee also declared that if the principles of *Alvarez-Machain* were to gain international acceptance "the International Juridicial Order would be irreversibly shattered." *Id.* The Committee concluded by stating the United States was obligated, as a matter of international law, to return *Alvarez-Machain* to Mexico. *Id.*

105. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted by consensus Dec. 19, 1988, U.N. Doc. E/CONF.82/15 and rev. 1, reprinted in 28 I.L.M. 493, 500 (1989). The additional language quoted above was created in direct response to United States abductions on Nov. 11, 1990.

Beginning, at least, in 1945, the United States has helped to create these norms of customary international law, and has promised to uphold them. In fact, the United States has been the *major* player in creating a system of international relations based upon territorial respect. The principle of "territorial sovereignty" is clearly a norm of customary international law. The United States has agreed to uphold this principle, upon which much of the international order is founded. Unsanctioned military or police actions in the territory of another state *clearly* violates these international obligations. Forcible abductions violate international law, which the United States has sworn to obey, and such obligations should have been upheld by the courts.

2. *Violations of Individual Rights.* In addition to violating state sovereignty, forcible abductions also violate individual rights as defined under international law.¹⁰⁶ The International Covenant on Civil and Political Rights (ICCPR) provides individuals with basic protections from arbitrary arrest and unreasonable delay before trial.¹⁰⁷ It also provides that "everyone has the right to liberty and security of person[, and that n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."¹⁰⁸ Finally, the ICCPR prohibits "cruel, inhuman or degrading treatment or punishment,"¹⁰⁹ and declares that "all persons deprived of their liberty shall be treated with humanity and . . . respect for the inherent dignity of the human person."¹¹⁰ The Human Rights Committee, which interprets and explains the ICCPR, has declared that forcible abductions "constitute arbitrary arrest and detention" outside of the "procedures established by law."¹¹¹

Arbitrary arrest and detention are also prohibited by the Universal Declaration of Human Rights and the American Convention on Human Rights. The American Convention on Human Rights states: "[e]very person has the right to have his physical, mental, and moral integrity respected."¹¹² This language is echoed in the

106. Some may argue that the examples of international law discussed here and above are all non-self-executing documents, and that as such they do not carry domestic implications. However, the distinction between self-executing and non-self-executing is relevant only as to *treaties*. The documents discussed here have been put forward to show examples of *customary* international law, which is automatically self-executing against all states.

107. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, art. 9, U.N. Doc. A/6316 (1966).

108. *Id.* at art. 9(1).

109. *Id.* at art. 7.

110. *Id.* at art. 10(1).

111. *Id.*

112. O.A.S.T.S. No. 36 (1970).

Universal Declaration of Human Rights, which states that "[n]o one shall be subjected to arbitrary arrest, detention or exile."¹¹³

Forcible abductions simply cannot be reconciled with the basic rights detailed in the ICCPR and other treaties, since "[i]n any case of abduction, there is a violation of personal liberty, [and] of the right to be detained under legal authority Personal integrity is [also] usually violated because of the force typically required to subdue and transport an abductee."¹¹⁴ Once again, forcible abductions do not violate "principles," they violate basic international laws.

B. Customary International Law in the United States

1. *The Case of The Paquete Habana*. The dispute over the domestic applicability of customary international law in the United States derives in large part from the 1900 case of *The Paquete Habana*, and especially from the following celebrated passage from that case:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty, and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations¹¹⁵

On the one hand, this pronouncement affirmed the incorporation of international law into the decision-making process of the United States judiciary. At the same time, however, some have interpreted it to mean that international law, and specifically customary international law, can be superseded by either federal statutory provisions or executive acts. In effect, the decision handed down in *The Paquete Habana* has had the unfortunate consequence of eviscerating customary international law in the United States. Even though Justice Gray deserves the credit for confirming the domestic applicability of customary international law, his reservations about its implementation have effectively precluded its use except in the rarest of cases.

The Paquete Habana arose from the Spanish-American War. The facts of the case revolve around the seizure of two Cuban fishing vessels by the United States Navy, pursuant to a naval blockade around Cuba. By proclamation of the President, the blockade was to be maintained "in pursuance of the laws of the United States, and

113. G.A. Res. 217A(III), 3 U.N. GAOR (Resolutions, part I) at 71, U.N. Doc. A/810 (1948).

114. Crystle, *supra* note 6, at 394.

115. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

the law of nations applicable to such cases."¹¹⁶ Because of this proclamation, the Supreme Court held that the blockade was intended to be conducted "in accordance with the principles of international law sanctioned by the recent practice of nations."¹¹⁷ Justice Gray therefore spent a considerable amount of his decision discussing the historical prohibitions against the capture of fishing vessels during wartime.¹¹⁸ From this historical pattern, he came to the conclusion that the exclusion of fishing vessels from prize captures was a general norm of customary international law, and he therefore ordered the boats returned to their owners.

In essence, then, *The Paquete Habana* Court did not apply customary international law directly, but only through the medium of the presidential proclamation. It is not clear whether Justice Gray would have applied international law were it not for the fact that the presidential proclamation declared that it should be applied, although his dictum suggests that he would. On the other hand, if the President had declared that fishing vessels were legitimate targets for capture, then under the same dictum the Court would be precluded from introducing international law on behalf of the injured party. At any rate, the case has come to be interpreted by the executive branch as a declaration that it may violate international law at any time merely by expressly doing so, and that the Supreme Court is helpless to intervene.¹¹⁹

This interpretation has been encouraged by numerous examples of judicial refusal to decide issues of customary international law, notably including the cases of *National City Bank of New York v. Republic of China*,¹²⁰ *Anglo Chinese Shipping Co. v. United States*,¹²¹ and *Eisner v. United States*.¹²² In all of these cases, the

116. Proclamation No. 6, 30 Stat. 1769 (1898), quoted in *The Paquete Habana*, 175 U.S. at 712.

117. *The Paquete Habana*, 175 U.S. at 712.

118. Justice Gray examined, among other things, agreements made between Henry IV of England and the King of France in 1403, *id.* at 687, Louis XVI's directive to his navy that fishing vessels should be exempted from capture, *id.* at 689-90, and Napoleon's criticism of the English for violating the norms of international conduct by capturing fishing vessels attempting to cross the English blockade, *id.* at 692-93.

119. See *infra* part III.B.2.

120. 348 U.S. 356 (1955) (refusing to grant the Taiwan government sovereign immunity in a case involving defaulted treasury notes; deciding the case instead upon equity considerations).

121. 127 F. Supp. 553 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955). During the Allied occupation of Japan, General MacArthur had ordered the Japanese government to effectuate some repairs. In making its decision the court refused to consider whether, under customary international law, an occupying force may make such orders to the conquered nation. Instead, the court felt that MacArthur's order was for the benefit of the Japanese, and thus to make the United States pay for the repairs would constitute unjust enrichment.

courts have refused to consider customary international law, choosing to rely instead upon issues of policy and equity. Thus, it is argued, the judiciary allowed the executive branch, and the military under its authority, to violate international law without a review of its actions.

2. *The Paquete Habana's Unfortunate Legacy.* The end result of this interpretation can be seen in recent pronouncements by high ranking officials of the Department of Justice and the State Department, which have proclaimed the authority of the executive branch to violate customary international law without fear of judicial review. In particular, they have claimed that the judiciary is barred from applying customary international law to cases of governmentally sponsored kidnappings abroad.

In 1989, William Barr, then Assistant Attorney General of the United States, testified before the House Judiciary Committee that executive branch authorization of forcible abductions of foreign nationals would violate international law.¹²³ Nevertheless, Barr maintained that "[u]nder our constitutional system, the executive and legislative branches, acting under the scope of their respective authority, may take or direct actions which depart from customary international law."¹²⁴

This view contradicts a 1980 Carter administration opinion, which declared that the government only had the power to conduct abductions of fugitives "when the asylum state acquiesces to the proposed operation."¹²⁵ In effect, the Justice Department, under the Bush administration, completely reversed the United States' position on the constitutionality of executive violations of international law.¹²⁶

122. 117 F. Supp. 197, 199 (Ct. Cl. 1954) (refusing to examine international law questions about the powers of occupying forces to act in a conquered territory; justifying the conversion of plaintiff's bank account by the American commander in Berlin as an action that was "reasonably calculated to accomplish a beneficial purpose").

123. See *Extraterritorial Enforcement Activities*, *supra* note 4. Barr's testimony before the Senate Subcommittee was intended to summarize the views expressed in a confidential Justice Department memorandum. At the hearing, Barr declared that he was "happy to share with the Committee [the Justice Department's] legal reasoning and conclusions," but that "the content of the 1989 Opinion . . . must remain confidential." *Id.* at 11.

For a more complete analysis of the circumstances surrounding Barr's statement before the Senate Subcommittee see Harold Honju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 CARDOZO L. REV. 513, 518-19 (1993); Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992).

124. *Extraterritorial Enforcement Activities*, *supra* note 4, at 4.

125. *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Counsel 543, 544 (1980).

126. See *Extraterritorial Enforcement Activities*, *supra* note 4, at 6; see also Brief for

Abraham Sofaer, then Legal Advisor for the Department of State, further supported this position by declaring that the United States must be allowed to conduct forcible abductions because "our national defense requires that we claim the right to act within the territory of other States in appropriate circumstances."¹²⁷ Although Sofaer conceded "[i]t would be wrong . . . to extrapolate . . . that [forcible] seizures [abroad] are perfectly lawful,"¹²⁸ he supported the position of the Barr opinion by declaring that "the Due Process clause of the Constitution does not automatically preclude U.S. courts from trying persons forcibly seized abroad by U.S. authorities."¹²⁹

Such an argument does not suppose that violations of international law, in the form of forcible abductions, will not be attacked on the international stage. Instead, it proposes that the domestic judiciary has declared itself, in *The Paquete Habana* and elsewhere, to be powerless to review or rectify such violations.

Barr, and the Justice and State Departments, were of the view that *The Paquete Habana* decision stands for the proposition that international law should be applied in United States courts only "where there is no treaty and no controlling executive . . . act."¹³⁰ Thus, where the executive branch takes "controlling" action, or, under their interpretation, almost *any* action,¹³¹ customary international law should not be applied by United States courts to nullify such action.

To support this view, Barr cited *Brown v. United States*,¹³² *The*

Respondent at 16 & n.11, *United States v. Alvarez-Machain*, 112 S. Ct. 1189 (1992) (No. 91-712). Interestingly, this Brief declares that: "In 1976, Congress specifically prohibited the DEA from taking part in arrests of foreign nationals in the sovereign territory of other governments. This action was a specific response to concerns over DEA activities abroad." *Id.* (citations omitted).

127. Abraham Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 92 (1989).

128. *Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Governmental Employees and Citizens Abroad: Hearing on S. 1337, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1985).

129. *Id.*

130. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

131. For instance, in the *Alvarez-Machain* case, it is not argued that the President authorized the abduction through any "controlling act." In fact, the evidence is clear that no person outside of the Drug Enforcement Agency authorized, or was even aware of, the plan to kidnap Alvarez-Machain. In what way this satisfies the Justice and State Department's definition of "controlling executive action" is entirely unclear.

132. 12 U.S. (8 Cranch) 110 (1814). *Brown* involved the improper actions of John Delano, a shipowner who had contracted to carry timber and other goods to British merchants in Plymouth, England, during the War of 1812. When he attempted to sail for Plymouth, he was blocked by the United States embargo and sent back to New Bedford,

Schooner Exchange v. M'Faddon,¹³³ *Tag v. Rogers*,¹³⁴ and *The Over the Top*.¹³⁵ However, commentators on this subject have convincingly shown that these cases do not support the Justice Department's opinion as to the power of the executive branch to violate international law. In particular, Richard Pregent has noted that

[e]very case cited in [Barr's] statement before Congress and all other recorded cases dealing with this issue, refer to the displacement of interna-

Massachusetts.

At New Bedford, he sold the goods to Armitz Brown, an American. Five months after selling these goods, Delano then seized the goods in the name of the United States, because, he claimed, the goods belonged to British subjects and therefore were subject to seizure during time of war. Delano argued that the property had originally been sold to British citizens, and that after war between the United States and England had been declared, all property owned by British citizens was forfeited under customary international law, and it did not matter that the property had subsequently been sold to an American.

Chief Justice Marshall felt that customary international law would not allow for the seizure and ruled against Delano. However, Marshall noted in dicta that customary international law was only "a guide which the sovereign follows or abandons at his will . . . and although it cannot be disregarded by him without obloquy, yet it may be disregarded." *Id.* at 128.

133. 11 U.S. (7 Cranch) 116 (1812). The *Schooner* decision concluded that, under customary international law, a French warship could not be subject to United States judicial action while in American territorial waters. However, the Court also stated, in dicta, that a sovereign has the right to suspend that law within its territory. As Chief Justice Marshall noted:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 136.

134. 267 F.2d 664 (D.C. Cir. 1959). *Tag* involved a constitutional attack on the legality of the Trading with the Enemy Act, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. § 1 *et seq.*) *Tag* argued that the statute was in violation of the 1923 Treaty of Friendship, Commerce and Consular Right between the United States and Germany, 44 Stat. 2132, amended by 49 Stat. 3258 (1935).

The court, doing little more than reaffirming the holding in the *Chinese Exclusion Case*, held that Congress has the right to pass later statutes that invalidate preexisting treaties. For a discussion of the *Chinese Exclusion Case*, see *infra* notes 144-49 and accompanying text.

135. 5 F.2d 838 (D. Conn. 1925). *The Over the Top* involved the sale of alcohol in international waters during the time of Prohibition. The court held for defendants because their actions had taken place in international waters, and Congress had not specifically declared that the reach of Prohibition statutes was intended to extend beyond the three mile limit of territorial waters. However, the court also declared that Congress could so extend the reach of the statute in the future, and thus effectively overrule the customary international law limit of three miles. *Id.* at 843.

tional law *within the territory controlled by the sovereign*. There exists no case law that sets forth the authority of either Congress or the President to displace international law *outside the territory of the United States*.¹³⁶

Pregent is not entirely satisfied with the idea that Congress or the President has absolute authority to displace international law even within the domestic system:

[I]nternational law can be displaced domestically. Many issues remained to be settled, however. Left in doubt were the matters of the kind of international law that could be displaced, the governmental entities that could displace this law, and how this displacement might be accomplished.¹³⁷

Thus, there has never been clear precedential support for a general power of the executive to displace customary international law. Unfortunately, the Supreme Court's decision in *Alvarez-Machain* may become the precedent that, until now, the executive has lacked. Accordingly, William Barr has praised the decision, declaring that it "vindicates the position we have taken from the outset,"¹³⁸ namely that, under *The Paquete Habana*, executive power to violate international law remains unchecked by the judiciary.

IV. THE COURTS' DEFERENTIAL STANCE

An explanation for the continued vitality of this interpretation of *The Paquete Habana* and its progeny can be found in the traditional role that courts have played in reviewing the executive's foreign policy decisions. Generally speaking, they have been unwilling to interfere with them in any way. This unwillingness has manifested itself in two ways. First, in discussing such controversial areas as the power of the federal government to conduct foreign affairs, or of the President to act in the interests of national security, the courts have granted broad discretionary powers that are not constitutionally mandated. Second, in those rare instances where the courts have not found "implicit" constitutional grants to uphold

136. Richard Pregent, *Presidential Authority to Displace Customary International Law*, 129 MIL. L. REV. 77, 83-84 (1990).

137. *Id.* at 80. For further criticism, see Leigh, *supra* note 123; see also Michael R. Pontoni, *Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives*, 21 CAL. W. INT'L L.J. 215 (1990/1991); Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Brigitte Belton Homrig, Comment, *Abduction as an Alternative to Extradition—A Dangerous Method to Obtain Jurisdiction Over Criminal Defendants*, 28 WAKE FOREST L. REV. 671 (1993). But see *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.) (holding that "public international law is controlling only 'where there is no treaty and no controlling executive or legislative act or judicial decision'"), *cert. denied*, 479 U.S. 889 (1986).

138. David G. Savage, *U.S. Abductions Abroad Upheld*, L.A. TIMES, June 16, 1992, at A1.

actions taken by the executive branch, they have sidestepped the issue through liberal application of the political questions doctrine.

A. *Broad Extra-Constitutional Powers*

1. *The Federal Government Generally.* The power of the federal government to conduct foreign affairs is broad and exclusive. The ability of individuals or states to act on the international scene is restricted by the federal government, and in many cases is explicitly prohibited. The reason for this is clear: If foreign policy were allowed to be conducted by a myriad of actors, the disunity and conflict that would ensue could result in significant international discord. There is a clear logical need for allowing only one "person" to engage in American foreign affairs.¹³⁹

Although the logic of this argument seems clear, and has been repeatedly upheld, it is one that has no real constitutional basis.¹⁴⁰ Instead, it has traditionally been held that the inherent and exclusive power of the federal government to conduct foreign affairs is extra-constitutional.¹⁴¹ As Professor Henkin notes:

From the beginning, it was clear, this "more perfect union" was one sovereign nation and the federal government has maintained the relations of that nation with other sovereign nations. But the Constitution does not say so expressly or even by indisputable implication. Indeed, where foreign relations are concerned the Constitution seems a strange, laconic document.¹⁴²

Many important Supreme Court cases have helped to define the powers of the Federal government and the executive branch in foreign affairs. However, an examination of these cases shows that their decisions have no real constitutional support. For example, federal power in foreign affairs was articulated forcefully in *The Legal Tender Cases*:¹⁴³

The United States is not only a government, but is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations;

139. See *id.*; see also JEAN M. SMITH, *THE CONSTITUTION AND AMERICAN FOREIGN POLICY* 1-2 (1989).

140. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 19 (1972) ("The powers of the United States to conduct relations with other nations do not derive from the Constitution!").

141. See, e.g., *id.* at 15-18; SMITH, *supra* note 139, at 1-2.

142. HENKIN, *supra* note 140, at 15-16.

143. 79 U.S. (12 Wall.) 457 (1870).

all of which are forbidden to the State governments.¹⁴⁴

The rationale behind this holding also formed the basis for the Supreme Court's decision in *Chae Chan Ping v. United States (The Chinese Exclusion Case)*.¹⁴⁵ In that case, the Supreme Court held that Congress enjoyed the unlimited power to exclude Chinese aliens from the United States.

The case involved the constitutionality of the first national immigration act¹⁴⁶ and, in particular, a series of Chinese exclusion acts that were promulgated from 1882 to 1892.¹⁴⁷ The Court found the Acts to be within the power of Congress, stating that "the United States, in their relation to foreign countries . . . are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."¹⁴⁸

The basis for such a conclusion was found not in the Constitution but in nineteenth century conceptions of sovereignty and statehood.¹⁴⁹ The basic concept that the federal government has exclusive control over foreign affairs and national security is implied in the notion that the United States is a sovereign nation. The federal government, as representative of the nation as a whole, is therefore

144. *Id.* at 555 (emphasis added).

145. 130 U.S. 581 (1889).

146. See An Act Supplementary to the Acts in Relation to Immigration, ch. 141, 18 Stat. 477 (1875) (excluding prostitutes and all persons convicted of felonies from admission into the United States).

147. See An Act to Execute Certain Treaty Stipulations Relating to the Chinese, ch. 126, 22 Stat. 58 (1882); An Act to Amend an Act Entitled "An Act to Execute Certain Treaty Stipulations Relating to the Chinese," ch. 220, 23 Stat. 115 (1884); An Act to Supplement an Act Entitled "An Act to Execute Certain Treaty Stipulations Relating to the Chinese," ch. 1064, 25 Stat. 504 (1888); An Act to Prohibit the Coming of Chinese Persons into the United States, ch. 60, 27 Stat. 25 (1892), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387.

These Acts were intended to supplement an earlier Act of Congress that had attempted to ensure that immigration from China and other "Oriental" countries was voluntary on the part of those immigrating. See An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, 12 Stat. 340 (1862), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387.

It has been suggested that these Acts were passed due to rising "unemployment, economic depression, and growing 'nativism', racism, and xenophobia . . ." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 855 (1987); see also THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 1-18 (2d ed. 1991).

148. Chinese Exclusion Cases, 130 U.S. at 604.

149. Henkin, *supra* note 147, at 857-58 ("Indeed, although basing this power [to control immigration] in sovereignty was novel and in principle might have frightened many of the original framers as well as later guardians of states' rights, the conclusion that Congress had authority to regulate immigration was in fact accepted and has not been challenged.") (footnotes omitted).

vested with the powers of that sovereign. This concept was to find its greatest and most famous support in Justice Sutherland's opinion in the case of *United States v. Curtiss-Wright Export Corporation*.¹⁵⁰

Curtiss-Wright involved a Joint Resolution of Congress that empowered the President to prohibit the sale of arms and munitions to Bolivia and Paraguay.¹⁵¹ President Franklin D. Roosevelt issued a proclamation forbidding the sale of war materials to either country. Those convicted of violating the proclamation could be punished by fine or imprisonment, or both.

The Curtiss-Wright Corporation was charged with having attempted to sell fifteen machine guns to Bolivia. The company demurred to the allegations, insisting that the President was not authorized by the Constitution to make such a proclamation or to enforce it.¹⁵² Upholding the power of the President and Congress to issue such a prohibition, Justice Sutherland explicitly drew a distinction between the limited domestic authority of the government and the unfettered reach of its external powers.¹⁵³ Federal domestic authority, he held, derives from and is limited by the Constitution.¹⁵⁴ External authority, on the other hand, is not so derived, nor is it so limited:

It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. . . . [Many powers not] expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the war-

150. 299 U.S. 304 (1936).

151. At the time Bolivia and Paraguay were at war. The President was authorized to enforce this Resolution if he believed it would help to restore peace in the region.

152. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 311-14.

153. Justice Sutherland declared:

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

Id. at 315.

154. "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into the effect the enumerated powers, is categorically true only in respect of our internal affairs." *Id.* at 315.

rant for its conclusions not in the provisions of the Constitution, but in the law of nations.¹⁵⁵

The idea that this inherent right is found in the law of nations is intriguing. Justice Sutherland, in drawing upon international custom and practice to validate his theory, made it clear that the United States is afforded the privileges of international law. However, as even the *Curtiss-Wright* decision made clear, courts have been reluctant to declare that the federal government is also bound by the duties of being a member of what Sutherland called the "family of nations."¹⁵⁶ Sutherland's opinion demonstrated that the exclusivity of the foreign relations power in the federal government is an inherent right and not a constitutional provision.¹⁵⁷

2. *The Executive Particularly.* The conception that foreign policy is exclusively an executive matter began with the Framers of the Constitution.¹⁵⁸ In one of the earliest examples of support for this belief, Thomas Jefferson, upon being greeted by a French diplomat, made the following statement: "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."¹⁵⁹

A mere ten years later, John Marshall made the proclamation

155. *Id.* at 318; cf. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579 (1952) (declaring that the power of the President to act in national affairs, even when such actions have foreign implications, is not as expansive as his power to act in a purely international context).

156. *United States v. Curtis-Wright Export Corp.*, 299 U.S. at 318.

157. Not all constitutional scholars agree with the premises of Justice Sutherland's theory. See, e.g., David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946) (arguing that the "inherent rights" doctrine is contrary to the concept of a written Constitution). According to Levitan:

a careful check indicates that the whole theory and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court, waiting for an opportunity to be made the law of the land. The circumstances show that he had pre-formed opinions on the subject and that when he spoke in the *Curtiss-Wright* decision, he did little to reexamine his long cherished ideas.

Id. at 478.

Justice Sutherland had indeed written an earlier article which seemed to predict his final decision in *Curtiss-Wright*. See GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 417, 61st Cong., 2d Sess. (1910).

158. See SMITH, *supra* note 139, at 163 ("[I]t has been agreed since George Washington's time that the president is primarily responsible for the conduct of American foreign relations.")

159. *Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments*, April 24, 1790, 16 THE PAPERS OF THOMAS JEFFERSON, 1789-1790 at 378, 379 (Julian P. Boyd et al. eds., 1961). It seems the French diplomat, G  net, was sent by the French Republic with papers addressed to the Congress. *Id.* at 380-81 (editor's notes).

that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations He holds and directs the force of the nation."¹⁶⁰ Although Jefferson and Marshall were usually in disagreement over the powers of the federal government, they were in complete accord over the power of the President in this area.¹⁶¹

Although these two statements obviously had great persuasive weight, it was not until the Logan Act¹⁶² that the exclusive power of the President in this area was given any clear legal basis. This Act gave the President sole authority to meet with foreign powers, thus allowing the President to forbid a private citizen from meeting with the French government.¹⁶³ Thus, Congress was willing to take action to uphold the authority of the President in foreign matters.

The Supreme Court, in the early nineteenth century, did not squarely address the issue of the power of the executive branch to conduct foreign affairs. In fact, early judicial decisions surrounding the war-making powers of the executive seemed to limit that branch's power.¹⁶⁴ However, the Court did expand the powers of the executive branch, not by specifically validating expansive action, but by refusing to consider it.

In particular, the Supreme Court refused to consider the constitutionality of executive recognitions of foreign states. In *Luther v. Borden*,¹⁶⁵ the Supreme Court declined to determine which

160. 10 ANNALS OF CONG. 613 (1800).

161. See SMITH, *supra* note 139, at 163 ("Even such constitutional antagonists as Thomas Jefferson and John Marshall found common ground when it came to the president's power in foreign affairs.").

162. See Logan Act, ch. 1, 1 Stat. 613 (1799) (current version at 18 U.S.C. § 953 (1988)).

163. A Philadelphia Quaker named Logan had traveled to Paris to negotiate with the French government in an attempt to stop the escalating tensions between the United States and France. See CHARLES WARREN, HISTORY OF LAWS PROHIBITING CORRESPONDENCE WITH A FOREIGN GOVERNMENT AND ACCEPTANCE OF A COMMISSION, S. DOC. NO. 696, 64th Cong., 2d. Sess. 4-5 (1917).

More recently, the Logan Act was used by President Nixon to prevent Pierre Salinger from meeting with the North Vietnamese in 1972. SMITH, *supra* note 139, at 163-64.

164. For instance, the Court in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), held that the executive branch's power to conduct undeclared or limited wars was subject to an express grant by Congress. In that case, the Court invalidated an executive branch seizure of a foreign vessel as going beyond that which was intended by Congress.

Further, in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), the Court again viewed executive war-making powers in a restrictive way. In that case, the Court held that where Congress had passed legislation calling for a "defensive war," the executive branch was prohibited from conducting an offensive war (seizing enemy property).

165. 48 U.S. (7 How.) 1 (1849); see also *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (declaring that the judiciary is not the proper branch of government for determining which treaty should control a land dispute); *United States v. Palmer*, 16 U.S. (3 Wheat) 610 (1818) (holding that the power to recognize a foreign state is wholly within

government should be recognized as leading Rhode Island during Dorr's Rebellion. In refusing to question the government's determinations as to the recognition of a state, the Court withdrew from examining a large area of law that ultimately concerns foreign affairs, and thus granted the executive branch broad non-reviewable discretion in an important area of foreign affairs.¹⁶⁶

Although early Supreme Court decisions in the area of foreign affairs are few, the Supreme Court did actively participate in expanding executive branch power within the domestic system. The powers granted in these decisions have led directly to the vast expansion of executive branch power in foreign affairs, beginning with *The Paquete Habana* and continuing through *Alvarez-Machain*.

In *Martin v. Mott*,¹⁶⁷ for example, the power of the President to call out state militias was upheld.¹⁶⁸ Mott's challenge to the President's authority in this matter was thrown out with the sweeping statement that the President "is necessarily constituted the judge of the existence of the exigency, and is bound to act according to his belief of the facts."¹⁶⁹ Further, the President's discretion is not subject to later judicial review.¹⁷⁰

In *The Prize Cases*,¹⁷¹ the Court upheld the power of the President to usurp inherently Congressional powers in times of emergencies.¹⁷² Relying heavily upon the reasoning in *Martin v. Mott*, the

the domain of the political branches, and specifically the executive).

166. Obviously this case involved the government of one of the states of the union. However, in determining the power of the executive branch to make such a determination, the Supreme Court looked to the political branches' constitutional right to conduct foreign affairs free from judicial intervention.

167. 25 U.S. (12 Wheat.) 19 (1827).

168. *Id.* at 30. Mott, a New York militiaman, was fined \$96 by a court martial for failing to report for service in the War of 1812. After he refused to pay, property equaling that value was confiscated from him. Mott commenced suit to recover his goods from the United States Deputy Marshal (Martin) who had carried out the confiscation. In his suit, Mott claimed, among other things, that the President had abused his position as Commander-in-Chief by usurping Congress' exclusive right to call up the militia. He cited the Constitutional provision that "Congress shall have Power: . . . To provide for calling forth the Militia . . ." U.S. CONST. art. I, §8; *Martin v. Mott*, 25 U.S. (12 Wheat.) at 28.

169. *Mott*, 25 U.S. (12 Wheat.) at 31.

170. The court also stated that the President and military advisors were immune from civil suits that would attempt to challenge the wisdom and legality of their orders. "Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation." *Id.* at 30-31.

171. 67 U.S. (2 Black) 635 (1862).

172. At the beginning of the Civil War, April 27, 1861, President Lincoln ordered a blockade of all Southern ports. It was not until August 6, 1861, that Congress passed legislation validating the President's earlier blockade. During the interim, many neutral ships were confiscated and their cargo sold as prize. The owners of these vessels brought suit to recover the value of their ships and cargo, arguing that the blockade could not be valid without a Congressional declaration of war. *Id.* at 639-49.

Court held that the President had the authority to respond to crises as he saw fit:

Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportion as will compel him to accord them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decision and acts of the political department of the Government to which this power was entrusted. "He must determine the degree of force the crisis demands."¹⁷³

The powers conferred to the President during the Civil War, though immense, could be justified by the need for quick and decisive action. However, the President has also been given wide power to act with impunity even in the absence of an emergency.

*Mississippi v. Johnson*¹⁷⁴ involved the power of President Andrew Johnson to enforce the Reconstruction Acts immediately following the Civil War.¹⁷⁵ In upholding the power of the President to enforce the Acts the Court stated:

[W]e are unable to perceive that th[e circumstances of this case] take[] the case out of the general principles which forbid judicial interference with

173. *Id.* at 670. *The Prize Cases* resulted in a 5-4 decision. The dissent argued that Congress alone has the power to declare war, and that since Congress had not done so, the blockade was invalid:

[B]efore this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and Constitution of the United States, . . . it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war . . .

Id. at 688-89 (Nelson, J., dissenting).

Thus, the dissent made an argument based upon international law and the constitutional text. An acceptance of the dissent's argument, though perhaps undesirable for other reasons, would have supported the system of checks and balances that is inherent in our government. Instead, the majority gave the President the power to make unilateral declarations that can affect the nation's state of belligerence:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, *it is none the less a war, although the declaration of it be "unilateral."*

Id. at 668 (majority opinion) (emphasis added); see also *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (upholding the power of the President to suspend habeas corpus, and to try civilians in military courts, during times of emergency). For a short discussion of *The Prize Cases*, see SMITH, *supra* note 139, at 163-75. Smith notes that the holding has been relied upon to "sustain[] presidential initiatives from McKinley to Reagan." *Id.* at 165.

174. 71 U.S. (4 Wall.) 475 (1866).

175. Representatives from Mississippi argued that the Reconstruction Acts compromised freedoms guaranteed in the Bill of Rights. *Id.*

the exercise of Executive discretion The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.¹⁷⁶

The courts are not always willing to hold that the executive actually has certain powers that it purports to exercise. Rather than invalidate the executive action, however, they often avoid deciding the issue at all, through application of the political questions doctrine.

B. *The Political Questions Doctrine*

The political questions doctrine has been defined as "a magical formula that has the practical result of relieving a Court of the necessity of thinking further about a particular problem. It . . . transfer[s] the problem to another branch . . . [and] sometimes [leaves] the problem in mid-air so that no branch decides it."¹⁷⁷ This definition may be a bit harsh. The doctrine can more generously be defined as an attempt by a court to avoid those issues which it feels that it cannot or should not decide. There are two motivating factors behind this decision. First, there is the prudential doctrine that a court should not decide cases that may jeopardize its power within the Constitutional system (i.e., those cases where to challenge Presidential authority may end up forcing the President to ignore the court altogether). Second, there is the view that there are questions the court cannot decide because the questions are inherently so political that they do not give rise to the possibility of judicial remedy.

In many ways, Chief Justice John Marshall is responsible for the creation of the political questions doctrine. The historical basis of the doctrine can be found in his most famous decision, *Marbury v.*

176. *Id.* at 499-500; see also SMITH, *supra* note 127, at 166. Smith contends that the language quoted above is directly attributable to the statement of Attorney General Stanbery that:

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, . . . but it is on account of the office he holds that . . . the President is above the process of any court . . . to bring him to account as President.

Id. at 166 (quoting Attorney General Stanbery).

In Smith's opinion, the decision in *Mississippi v. Johnson* has had the effect of "placing the president beyond the reach of judicial intervention in the exercise of his official powers." *Id.*; see also *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (giving the President immense discretion and power in matters that involve the armed forces, and holding that the President's "duty and . . . power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual.").

177. John P. Frank, *Political Questions*, in *SUPREME COURT AND SUPREME LAW* 36, 37 (Edmond Kahn ed., 1954).

Madison.¹⁷⁸ As a natural corollary to the doctrine of judicial review, Marshall indicated that there are times when courts should *not* exercise review. He cited political questions as an example of such a time:

[T]he Constitution [gives the President] certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in political character, and to his own conscience . . .

Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.¹⁷⁹

The doctrine was strengthened several years later, when Chief Justice Marshall, given the opportunity to decide an issue of foreign policy, put his deferential theory into law in *Foster v. Neilson*.¹⁸⁰

Foster involved a series of land transactions among Spain, France, and the United States. As a result of these transactions, the parties to the suit both possessed title to the same tracts of land. Foster's title was declared valid by Spain, and Neilson's was purchased from the United States. In holding for Neilson, Marshall declared that foreign policy questions were inherently "more political than legal"¹⁸¹ and should be left to the President and Congress:

In a controversy between two nations concerning boundary, it is scarcely possible that the Courts of either should refuse to abide by the measures adopted by its own government . . . The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established . . . it is the province of the Court to conform its decisions to the will of the legislature.¹⁸²

178. 5 U.S. (1 Cranch) 137 (1803) (declaring that the judiciary has the right to review the constitutionality of acts of Congress and the President).

179. *Id.* at 164-65.

180. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 308 (1829).

181. *Id.* at 308. Spain ceded the Louisiana territory to France by the treaty of St. Ildefonso (1800). In turn, France, by the treaty of Paris (1803), ceded it to the United States for a sum of money. *Id.* at 301. The United States claimed lands that fell between the Iberville and Perdido rivers, then known as West Florida and what today makes up the Gulf Coast of Alabama, Mississippi and Louisiana east of the Mississippi River. *Id.* at 308-09. Spain, on the other hand, contended that the treaty of St. Ildefonso applied only to that territory west of the Mississippi River and the island of New Orleans. Foster and Elam, plaintiffs, were granted title to land in the disputed area by the King of Spain in 1804. *Id.* at 310. Neilson also held title to that land. The Supreme Court declared that the United States' interpretation of the treaty was all that mattered in United States courts, and dismissed the suit. *Id.* at 314.

182. *Id.* at 308.

Thus, the Court's most famous voice began a process that has continued until today. It is a process whereby the judiciary, in an attempt to keep the branches of the government separate, has not only deferred to the executive in areas of foreign policy, but in so deferring has greatly increased the executive's sway over all affairs considered foreign.

In 1839, the Supreme Court declared in *Williams v. Suffolk Insurance Company*¹⁸³ that "it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question."¹⁸⁴ In 1978, when President Carter repudiated America's Mutual Defense Treaty with the Republic of China (Taiwan) on his own authority, the Supreme Court declined to review the question,¹⁸⁵ even though the matter clearly involved questions about the role of the legislative branch.¹⁸⁶

183. 38 U.S. (13 Pet.) 415 (1839). In this case, Great Britain and Buenos Ayres had both claimed sovereignty over the Falkland (or Malvinas) Islands. Buenos Ayres took control of the islands in 1829, but the United States government refused to recognize the claim. Subsequently, two American ships, the *Harriet* and the *Breakwater*, were seized for fishing in the territorial waters of the Falklands in defiance of a ban declared by Buenos Ayres. *Id.* at 416. The owners of the ships attempted to recover from their insurers, *Suffolk Insurance*, but the insurer refused to allow recovery. The insurer's refusal was based upon the theory that the shipowner had taken the risk of losing his ship by defying the Buenos Ayres ban. The Court held that the shipowner was not bound to heed the ban, for according to the United States government:

If these islands are not within the jurisdiction of the Buenos Ayrean government, the power assumed and exercised . . . was unauthorized, and the [ship's] master was not bound to regard it.

. . .

[I]t is the opinion of this Court, 1st, That, inasmuch as the American government has insisted and still does insist . . . that the Falkland Islands do not constitute any part of . . . Buenos Ayres, the action of the American government on this subject is binding . . . as to whom the sovereignty of those islands belongs.

Id. at 421-22.

184. *Id.* at 420 (emphasis added). Note that the Court refers to the President's "constitutional functions," even though the powers granted in this case are clearly extra-constitutional.

185. *Goldwater v. Carter*, 444 U.S. 996 (1979). This case involved a constitutional challenge by Senator Goldwater and others to the President's authority to terminate a treaty without Senate approval. The treaty in question was a mutual defense treaty with the Republic of China (Taiwan). Justice Rehnquist wrote the plurality opinion, stating: "In light of the absence of any constitutional provision governing the termination of a treaty . . . the instant case in my view . . . must surely be controlled by political standards." *Id.* at 1003.

186. Goldwater and the other Senators felt that the repudiation of a treaty should be subject to the same considerations involved in adopting a treaty. The Senators pointed specifically to the constitutional provision regarding the ratification of treaties: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2;

Other important applications of the political questions doctrine have included: the Supreme Court's consistent refusal to entertain arguments about the constitutionality of the Vietnam War¹⁸⁷ despite Constitutional text involving Congress' exclusive right to declare war;¹⁸⁸ the President's complete civil immunity for actions taken while President;¹⁸⁹ the ability to deny access to federal courts to those with claims against foreign governments;¹⁹⁰ the authority to order certain American citizens evacuated and incarcerated in time of war;¹⁹¹ and even the unlimited power to keep secret matters involving foreign affairs.¹⁹²

From the above, it is apparent that the most important role for the political questions doctrine can be found in areas that involve foreign policy. Although the doctrine may legitimately be employed to allow the Court the opportunity to evade issues which it either has no real business deciding, or prudently should avoid considering, it also has the danger of allowing the Supreme Court to avoid making tough decisions about the propriety of governmental conduct.

C. Summary

The retreat of the judiciary, though arguably prudent in many of the above cases, has not been without its deleterious consequences. In particular, the effect of the above decisions has been to surrender vast areas of judicial review to the sole discretion and judgment of the President. This has been the practice of the Court from the time of Jefferson to the present day, and shows no sign of abating. Though the legitimate need for a single voice in foreign affairs is one which seems self-evident, if anything truly can be so, the Supreme Court's continuing deference towards the executive branch has progressed from merely deferring to the President on matters of policy, to allowing him to violate international law with impunity.¹⁹³

Goldwater v. Carter, 444 U.S. at 999-1000. Goldwater felt that the cancellation of a treaty must also be subject to a two-thirds vote of the Senate.

187. See, e.g., *Luftig v. McNamara*, 252 F. Supp. 819, 819 (D.D.C. 1966), *aff'd*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967) (involving soldier who sought injunction preventing Secretary of Defense from sending him to Vietnam; dismissing action *sua sponte* because it raised an "obviously political question that is outside the judicial function").

188. U.S. CONST. art. I, § 8.

189. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

190. *Dames v. Regan*, 453 U.S. 654 (1981).

191. *Korematsu v. United States*, 323 U.S. 214 (1944).

192. *United States v. Nixon*, 418 U.S. 683 (1974); *Chicago & Southern Air Lines v. Waterman*, 333 U.S. 103 (1948).

193. See *supra* part III.B.2.

Such is the legacy and effect of *Alvarez-Machain*.

The Supreme Court has not only allowed the President to violate international law, but seems to have fully supported him. Although the judiciary may be justified in deferring to the executive Branch under domestic law, such deference cannot be tolerated when it involves violations of international law. This is a direct consequence of the United States' duties and responsibilities as a member of the "family of nations."

V. THE HISTORIC APPLICATION OF CUSTOMARY INTERNATIONAL LAW

A. *The Law of Nations in Common Law England and the Original Thirteen Colonies*

The Law of Nations has long been part of the law of the land in both England and the United States. Drawing on the writings of Grotius, Burlamaqui, Pufendorf, Vattel, and others,¹⁹⁴ early English jurists did not view international law and domestic law as separable entities, but rather as two enunciations of the law of nature.¹⁹⁵ This commonly accepted perception of the essence of international law made its acceptance into the domestic courts very easy.

The incorporation of the law of nature into English domestic law is clear from *Dr. Bonham's Case*.¹⁹⁶ In that case, Lord Coke declared that "an act of Parliament [that] is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."¹⁹⁷ In *Calvin's Case*,¹⁹⁸ he further declared:

1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England: 3. That the law of nature was before any judicial or municipal law in the world: 4. That the law of nature is immutable, and cannot be changed.¹⁹⁹

These cases confirmed the widely held view that acts of the legislature could not validly contravene the law of nature. Because inter-

194. See generally J. J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* (Thomas Nugent trans., 2d. ed. 1763); EMERICH DE VATTEL, *THE RIGHTS OF MEN* (1758); HUGO GROTIUS, *DE JURE BELLI AC PACIS* (Francis N. Kelrey trans., 1964); SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* (Charles H. Oldfather & William A. Oldfather trans., 1934).

195. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35 (1952) [hereinafter Dickinson, I]; Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1079 (1985).

196. 77 Eng. Rep. 638 (C.P. 1610).

197. *Id.* at 652.

198. 77 Eng. Rep. 377 (C.P. 1610).

199. *Id.* at 382.

national law is derived from and defined by the law of nature, the Parliament also had no right to contravene it or to attempt to change it.²⁰⁰

This view was confirmed almost two hundred years later by Lord Stowell, when he declared that

[i]n the first place it is to be recollected that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the Law of Nations, simply, and exclusively of the introductions of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance.²⁰¹

The great Lord Mansfield gave his approval to this view when he declared that "[t]he privileges of public ministers and their retinue depend upon the law of nations; which is *part* of the common law of *England*. And the Act of Parliament . . . did not *intend* to alter, nor *can* alter the law of nations."²⁰² Thus, "there never was any doubt that the Law of Nations was part of the law of England."²⁰³

In much the same way, the early history of United States law is linked inexorably with the Law of Nations. It is generally held that the realization of independence from England gave the United States the privileges and duties of the Law of Nations. This is most readily apparent in the Declaration of Independence.

The Declaration posited that "these United Colonies are, and of

200. See Lobel, *supra* note 195, at 1081-82.

201. The Recovery, 165 Eng. Rep. 955, 958 (Adm. 1807).

202. Heathfield v. Chilton, 98 Eng. Rep. 50, 50 (K.B. 1767) (emphasis added). The act that Lord Mansfield is referring to is the Act of Anne. This act was passed following the arrest in London of the Russian ambassador for indebtedness. The act made it a criminal offense to interfere with foreign ambassadors or public ministers. 7 ANNE, ch. 12 (1708). Blackstone posited that the statute was

not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world . . .

As to the rights of ambassadors, which are also established by the law of nations, . . . [i]t may here be sufficient to remark, that the common law of England recognizes them in their full extent . . . And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared, by the statute 7 Anne, c. 12, that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted, by confession or the oath of one witness . . . shall be deemed violators of the laws of nations, and disturbers of the public repose.

4 WILLIAM BLACKSTONE, COMMENTARIES *67, *70-71.

203. Dickinson, *supra* note 195, at 32 (referring to the argument of Lord Mansfield as counsel in Barbut's Case, 25 Eng. Rep. 777 (Ch. 1735)).

right ought to be, Free and Independent States [and] as Free and Independent States, they have the full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which Independent States may of right do."²⁰⁴ These "rights" as free and independent states were derived from the Law of Nations, which granted each free and independent state certain powers and privileges. Thus the very document giving birth to the nation declared that it assumed the privileges, and conversely the duties, found in the law of nations.

Early judicial decisions echoed this assumption. Judge McKean of the Supreme Court of Pennsylvania explicated this principle of American jurisprudence both before and after the adoption of the Constitution. In *Respublica v. De Longchamps*,²⁰⁵ McKean found that a case involving the law of nations was

a case of first impression in the United States. It must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania; and, if the offences charged in the indictment have been committed, there can be no doubt, that those laws have been violated.²⁰⁶

Later, in *Ross v. Rittenhouse*,²⁰⁷ McKean wrote:

[T]he law of nations, or of nature and reason, is in arbitrary states enforced by the *royal* power, in others, by the *municipal law* of the country; which latter may, I conceive, facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered.²⁰⁸

Similarly, in *Henfield's Case*,²⁰⁹ the Federal Circuit Court stated that "sovereign[s] hav[e] no right to command what is contrary to the law of nature,"²¹⁰ thereby intimating that executive actions which abrogate international law are null and void. This was more forcefully declared by Peter Duponceau, the lawyer who represented Henfield:

204. THE DECLARATION OF INDEPENDENCE para. 35 (U.S. 1776).

205. 1 Dall. 111 (Pa. 1784). This case involved an assault against the French Legation at the port of Philadelphia. The defendant was found to be guilty of "an infraction of the law of nations" and was handed a stiff sentence. See Dickinson, *supra* note 195, at 33-34.

206. *Respublica v. De Longchamps*, 1 Dall. at 114.

207. 2 Dall. 160 (Pa. 1792).

208. *Id.* at 162.

209. 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360). This case involved an American citizen charged with violating the United States' neutrality by serving on a French privateer during France's war with Great Britain and Spain. Chief Justice Jay felt that the citizen could be found guilty of an offense against the common law.

210. *Id.* at 1104.

The law of nations, being the common law of the civilized world, may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and every government . . . Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio rigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles . . . [T]his universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.²¹¹

Mr. Duponceau might be surprised to learn that according to his definition the United States has returned to "the savage state."

Applications of the law of nations within the domestic system were particularly plentiful in areas of admiralty and maritime law. In 1793, in *Talbot v. Johnson*²¹² the Supreme Court was asked to decide whether the seizure of a Dutch vessel by Americans privateering for France violated American neutrality in the war between France and England. The Supreme Court declared that the seizure violated international law and therefore was a "violation of our law (I mean the common law, of which the law of nations is a part . . .)."²¹³

Later, in 1815, the Supreme Court was asked in *The Nereide*²¹⁴ to decide whether a Spanish merchant's goods were exempt from seizure by American privateers when those goods were being transported on a British vessel. The Court held that since Spain was neutral in the war between England and the United States, goods of Spanish citizens were exempt from seizure. In so declaring, Chief Justice Marshall was not swayed by the fact that Spain did not treat American goods as being exempt in like circumstances. Refusing to alter the law of nations to include an American right to retaliate against Spain for its treatment of American citizens, Marshall declared that the "court is bound by the law of nations, which is a part of the law of the land."²¹⁵

Applications of international law, or the law of nations, were to be found in numerous cases concerning such topics as slavery,²¹⁶ piracy,²¹⁷ and maritime law.²¹⁸ In each and every one of these cases,

211. *Id.* at 1122 n.6.

212. 3 U.S. (3 Dall.) 133 (1795).

213. *Id.* at 161 (opinion of Iredell, J.).

214. 13 U.S. (9 Cranch) 388 (1815).

215. *Id.* at 423.

216. See *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (declaring that slavery was not prohibited by the law of nations).

217. See *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144 (1820) (holding that

the Court applied international law as an independent source of law distinct from constitutional or common law principles.

The belief of early American courts that the law of nations was applicable in domestic courts seems clear. However, the historical record is not confined to such evidence alone. The Constitution itself anticipates domestic application of international law.

B. *The Law of Nations and Article III*

A brief review of the Constitutional Convention provides clear authority for the proposition that the United States judiciary was established with the goal of adjudicating "infractions of treaties or of the law of nations."²¹⁹ The various state plans for a constitution all agreed on one point: that the national judiciary should be given jurisdiction to enforce all areas of international law.²²⁰

The language of the Constitution echoes this belief. The judicial power of the United States was to be vested "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."²²¹ The jurisdiction of these courts was declared to include:

[A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; . . . In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all other cases before mentioned the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.²²²

That the Framers intended this language to encompass the ju-

piracy was a crime against all nations); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) (declaring that piracy was a well defined crime under international law and did not need further clarification by Congress). For a deeper discussion of these and other piracy cases, see G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, in *FOREIGN AFFAIRS AND THE CONSTITUTION* 16 (Louis Henkin et al. eds., 1990).

218. See *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); *The Schooner Adeline & Cargo*, 13 U.S. (9 Cranch) 244 (1815); see also William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

219. Madison's Notes in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911); see also McHenry's Notes in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* at 25 (quoting Edmund Randolph's enumeration of the defects of the Articles of Confederation as outlined in the Virginia Plan).

220. See Dickinson, *I*, *supra* note 195, at 37-46; Lobel, *supra* note 195, at 1094-1102.

221. U.S. CONST. art. III, § 1.

222. *Id.* at art. III, § 2, cl. 2.

diciary's responsibility to apply the law of nations is evident from their statements. Alexander Hamilton, for example, argued that "having taken our station among nations and having claimed the benefit of the laws which regulate them, [the United States] must in our turn be bound by the same laws."²²³

The common law heritage of the law of nations is codified in the Constitution: the law of nations is part of the law of the United States. The national judiciary was created to be the arbiter of that law and to ensure its application and enforcement. Any other interpretation is simply inconsistent with the fundamental understandings and wishes of the Framers. Yet, as *Alvarez-Machain* has shown, the later treatment of international law in United States courts has been in clear derogation of these principles.

VI. PROBLEMS FACING A MODERN APPLICATION OF CUSTOMARY INTERNATIONAL LAW

The preceding sections have put forth the argument that governmentally sponsored forcible abductions violate customary international law. Further, they have argued that the Framers, in creating an independent federal judiciary, had in mind the establishment of a judicial body that would have jurisdiction over and would apply international law against state and federal governments in appropriate circumstances. In other words, an examination of the constitutional system envisioned by the Framers produces an undeniable result - there is no *constitutional* bar to an application of international law by the federal judiciary to invalidate actions of the state and federal governments that violate that law.

Unfortunately, this conclusion does not end the discussion. Over the course of time, a number of practical and theoretical factors have worked to frustrate any expansion of the domestic application of customary international law. Many of these reasons, however, are no longer historically valid, and others were logically flawed from the beginning.

223. 3 THE PAPERS OF ALEXANDER HAMILTON 550 (Harold C. Syrett ed., 1961). Hamilton also declared that:

As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

THE FEDERALIST No. 80, at 536 (Jacob E. Cooke ed., 1961).

John Jay echoed these sentiments by stating that "[t]he wisdom of the Convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended." THE FEDERALIST No. 3, at 15 (Jacob E. Cooke ed., 1961).

A. Historical Factors

1. *Tradition of Non-Application.* One of the most difficult aspects surrounding the issue of the status of customary international law in the United States is the lack of clear judicial precedent. The dearth of judicial decisions in this area can be attributed to older cases that attribute expansive powers to the federal government as a whole and the executive in particular, or to judicial avoidance of such questions through broad use of the political questions doctrine.

Some commentators, however, have taken this historical "reluctance" of the judiciary as a sign, in itself, of the inadequacy and inappropriateness of customary international law as a basis for judicial review of foreign policy actions. They have argued that the judiciary has not broadly applied customary international law because judges "understand" that customary international law is an inappropriate basis for invalidating government action.²²⁴ In many ways, these commentators share the views of William Barr, Abraham Sofaer, and the Justice Department about the power of the executive branch to violate international law. However, unlike Barr and Sofaer, these commentators do not find an explicit grant of power by the judiciary;²²⁵ instead, they look at the fact that "American courts have rarely applied customary international law, and have almost never applied it as a direct restraint against a government or a governmental interest"²²⁶ to come to the conclusion that "the federal court's reluctance [to apply customary international law] obviously reflects a belief"²²⁷ or "shows a clear trend"²²⁸

224. See, e.g., Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VIRG. J. INT'L L. 143 (1984); Trimble, *supra* note 86; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Matorin, *supra* note 6; see also *Extraterritorial Enforcement Activities*, *supra* note 4; *International Law*, *supra* note 4.

225. See discussion of Barr and Sofaer's views, *supra* part III.B.2.

226. Trimble, *supra* note 86, at 684. Trimble argues:

Of more than 2000 "international law" cases decided between 1789 and 1984, less than fifty involved the application of customary law when the executive branch had not expressed an opinion . . . [and] even the small number of customary law cases is deceptively high. *Most of those cases are relatively old* and an examination of the entire body of cases shows a clear trend away from judicial determination of legal rules and a movement toward judicial deference to political branch direction.

Id. at 685-87 (emphasis added); see also Weisburd, *supra* note 224, at 1226-31. Weisburd argues that there are only "five cases from the general period in question [that] include language that would appear to support the argument that the law of nations was seen as falling within the 'law of the United States.'" *Id.* at 1226. Weisburd's view of customary international law is that it is binding on the executive branch only if it is included in the Constitution's definition of "laws" inherent in the President's obligation to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

227. Weisburd, *supra* note 224, at 1268.

that the judiciary understands that customary international law should not hold an important place in American jurisprudence. In the end, judicial reluctance to apply international law brings these commentators to the conclusion that

whatever slim support there may have been in the early part of this century for the [belief that] . . . customary international law [restrains executive action] . . . has largely vanished . . . [and thus], the lesson is clear: there is no historical basis for the proposition that courts in fact restrain the government through the application of customary international law.²²⁹

Although the exact analysis, or theoretical approach, on this issue differs from person to person, the argument is still the same: historical analysis demonstrates that cases involving judicial application of customary international law are few and far between; such judicial disinclinations *must* be attributable to judges' beliefs in the inadequacy, either practically or theoretically, of customary international law; therefore, modern applications of that law are similarly foreclosed.

The absurdity of some aspects of this line of reasoning is obvious. The mere fact that the judiciary has historically been timid in its use of customary international law does not preclude its rebirth through an awakening of judicial minds to the law's value and importance. A perfect example of judicial neglect being rectified can be gleaned from the history of the Fourteenth Amendment. Ratified in 1868, the Fourteenth Amendment made possible the application of many protections found in the Bill of Rights to the states. However, it took nearly 100 years before the courts began to see the power to effect social change through the protections of the Fourteenth Amendment.²³⁰

A further criticism of this approach to customary international law is that the historical reasons for judicial reticence in this area are not necessarily attributable to deliberate decisions by judges as to the practical or theoretical weight that customary international

228. Trimble, *supra* note 86, at 687.

229. *Id.* at 687, 701.

230. The best example of the disuse of the Fourteenth Amendment can be seen in the judicial use of 42 U.S.C. § 1983 (1871). Passed in 1871, § 1983 was intended to aid individuals in bringing civil actions against state and local governments that violated their civil rights. However, "United States Code Annotated notes only 19 decisions under the section in its first 65 years on the statute books." Note, *Limiting Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486 n.4 (1969).

It was not until the Court's landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), that § 1983 began to see major application. In 1960, approximately 300 suits were brought under § 1983, but by 1982 the number had swelled to more than 17,000.

To argue that the courts are precluded from applying § 1983, merely because it had largely been ignored for much of its history, would be baseless and patently ridiculous.

law deserves. Instead, judicial disuse of customary international law can be attributed to particular historical events and perceptions that may not have continuing validity.

2. *Early Political Disputes.* One of the most influential historical events in the evolution of American politics and jurisprudence was the rise of party politics in the early federal government and the divisive impact of American neutrality in the war between France and Great Britain. In particular, the political clashes between the Federalists and the Republicans over American neutrality in the war between France and Europe resulted in the destruction of important jurisdictional aspects over the law of nations, including the courts' ability to hear individual violations of the law of nations under their common-law jurisdiction.²³¹

The defining moment in the fight between the Federalists and the Republicans came during the early 1790's with France's "new" war between Great Britain and her continental allies. On April 22, 1793, President Washington issued his Neutrality Proclamation,²³² declaring America's neutrality in the war. In that proclamation, Washington felt it necessary to include sanctions, grounded in international law, for individuals who violated America's neutrality. Ostensibly, these sanctions were intended "to prevent American citizens from participating on one side or the other; without such a statement disavowing [and punishing] the actions of enterprising or enthusiastic citizens, the country might find itself drawn into a conflict it wanted to avoid."²³³ However, Washington's decision to couch individual liability for violations of the neutrality in the law of nations was to create a division between the Federalists and Republicans that still has consequences today.

Washington authorized American authorities to punish all persons "who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them."²³⁴ Lacking a statute under which he could prosecute violators of the neutrality, Washington turned to the law of nations

231. For a deeper discussion of this subject, see John Zvesper, *American Political Parties and Constitutional Government*, in REFLECTIONS ON THE CONSTITUTION 148, 149-54 (Richard Maidment & John Zvesper eds., 1989); Stewart Jay, *The Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1042-113 (1985) [hereinafter Jay, *One*]; see also Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, II, 101 U. PA. L. REV. 792, 793-95 (1953) ("national jurisdiction at common law offenses against the Law of Nations was thus virtually to die a-borning, in political controversies . . ."); Weisburd, *supra* note 224, at 1213-14.

232. AM. STATE PAPERS I, 45.

233. DANIEL G. LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 87 (1985).

234. AM. STATE PAPERS I, 45.

to so prosecute. Such a decision was neither new nor controversial.²³⁵ Colonial American courts and United States courts under both the Articles of Confederation and the Constitution had long held jurisdiction to prosecute individuals for violations of the law of nations.²³⁶ However, prosecutions under the law of nations connected with the proclamation produced tremendous political fallout. The Federalists, who fully supported America's neutrality, saw the prosecutions as the only way to prevent individuals from plunging the country into war.²³⁷ Republicans, on the other hand, decried the neutrality as a betrayal of France and declared that the "Administration [had] desert[ed] the cause of liberty."²³⁸

The issue was to come to a head in the Administration's prosecution of Gideon Henfield for serving as prize master aboard the French privateer *Citoyen Gênet*. The Grand Jury was called to bring an indictment against Henfield. At the grand jury hearing, Justice Wilson outlined the charges:

No offense was detailed as to its elements, but Wilson indicated that capturing British prizes was an infraction against the law of nations (which he said was based on natural law) and a violation of a citizen's duty to the United States. Under the former the United States was obligated not to lend the use of its ports to privateers, and this law of nations was binding on country and citizen alike²³⁹

Henfield was ultimately acquitted by the jury. The Republicans

235. See Jay, *One, supra* note 231, at 1039 ("In the early years [of the Republic], there was little if any public notice of these prosecutions.").

236. *Id.*

237. Thomas Jefferson, as part of the Federalist government, explained the government's position:

Treaties are law. By the treaty with England we are in a state of peace with her. He who breaks that peace, if within our jurisdiction, breaks the laws, and is punishable by them. And if he is punishable he ought to be punished, because no citizen should be free to commit his country to war.

Letter from Thomas Jefferson to James Monroe (July 14, 1793), reprinted in 4 THE WRITINGS OF THOMAS JEFFERSON 18 (Henry A. Washington ed., 1856).

Earlier that same year, Chief Justice Jay charged the jury in *Henfield*: "they who commit, aid, or abet hostilities . . . offend against the laws of the United States, and ought to be punished . . ." *Henfield's Case*, 11 F. Cas. 1099, 1102-04 (C.C.D. Pa. 1793) (No. 6360). Included in the definition of the laws of the United States was the law of nations. As Professor Jay has noted, "[t]he thrust of Jay's remarks was that violators of neutrality harmed the nation itself, since '[t]he peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements.'" Jay, *supra* note 231, at 1045 (quoting *Henfield*, 11 F. Cas. at 1101 (Grand Jury Charge of Jay, Circuit Justice)).

238. Jay, *One, supra* note 231, at 1044 (citing LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 212 (1978)).

239. *Id.* at 1049 (citing *Henfield*, 11 F. Cas. at 1108 (Grand Jury Charge of Wilson, Circuit Justice)).

were ecstatic and took the opportunity to blast the Federalists for bringing "politically motivated" charges against an individual that were unfounded in law or the Constitution.²⁴⁰ In the end, the power of the government to bring common law charges against individuals, whether grounded in the law of nations or other sources, was struck down by the Court's decision in *United States v. Hudson & Goodwin*.²⁴¹ The Republicans had won the "political" battle, but the rejection of common law crimes, and the concomitant jurisdiction to hear cases involving the law of nations, had little or nothing to do with a conscious and deliberate choice by judges that *international law* was disfavored. That "the reaction to *Henfield* was mainly a product of its political subject matter"²⁴² is undeniable.

Although the controversy surrounding *Henfield* and *Hudson & Goodwin* did not involve the foreign relations power of the federal government or the executive branch, the rationale underlying the decision led to a widespread view among jurists that "general" laws, like the law of nations, were to be disfavored. The rationale underlying the repudiation of the common law was that laws not derived from authoritative sources were not proper bases for judicial decisionmaking.²⁴³

The law of nations, as it existed up until the 1940's, was almost purely customary in nature. Customary norms were found in the practice of states, or were believed to be part of the Divine Order in the law of nations. As such, judges who applied international law were forced to find the law from one of two sources—the law of nature or state practice. The fact that judges were applying non-codified law left the judiciary open to criticism that it was applying non-authoritative law. It is precisely this basis for judicial decisionmak-

240. *Id.* at 1052. "[T]he Republican newspapers 'universally asked "what law had been offended, and under what statute was the indictment supported?"' " *Henfield*, 11 F. Cas. at 1123 n.7 (quoting JOHN MARSHALL, *LIFE OF WASHINGTON* 273-74 (1807)).

241. 11 U.S. (7 Cranch) 32 (1812) (declaring that it had "long been settled in public opinion" that there is no federal common law of crimes). The Court's decision in *Hudson & Goodwin* was later reaffirmed in *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

242. *Jay One*, *supra* note 231, at 1063. See also Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1323 (1985) [hereinafter *Jay, Two*]:

The most we can conclude from a survey of jurisdictional theory from the *Hudson* period is that it was generally conceded that federal courts had what we would term significant common-law powers. From that conclusion we can deduce nothing about the authority federal courts ought to be assuming today. *Hudson* was decided in a peculiar setting of partisan disturbance, and grew out of a fear that we can scarcely appreciate today—the belief that there was a scheme afoot to install a consolidated national government through incorporation of the British common law.

Id.

243. See generally Weisburd, *supra* note 224.

ing that was repudiated in *Hudson & Goodwin*. However, this "theoretical" objection carries little weight today.

Since 1945, the basis of international law has become largely codified.²⁴⁴ Although customary international law is not based upon written obligations, its development and nature are easily drawn from the vast number of multinational treaties that exist today. At the very least, in the case of forcible abductions, the number of international documents declaring the rights of individuals and states under international law makes clear that such abductions are violative of customary international law.²⁴⁵ Such a finding does not require the judiciary to employ unfamiliar juridical tools. Customary international law has moved far closer to a "positivistic" notion of law than existed in the nineteenth century.

3. *The Rise of Positivism*. Another possible explanation for the reluctance of judges to fully utilize international law, throughout the nineteenth century and on into the present, was the rise of positivistic attitudes about the legitimacy of law, coupled with expansive concepts of sovereignty and national power. In particular, "[t]he rise of positivism in Western political and legal theory, especially from the latter part of the 18th century to the early part of the 20th century, corresponds to the steady rise of the national state and its increasingly absolute claims to legal and political supremacy."²⁴⁶

For hundreds of years, theories of international law were founded in concepts of a "natural law."²⁴⁷ Although legal philosophers differed as to the sources of laws,²⁴⁸ this theory held that laws derived from natural sources were of general application and acted as limits on sovereign power. A review of the cases discussed above clearly demonstrates that the early American judiciary was steeped

244. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW* at xvii-xxxi (3d ed. 1993).

245. See *supra* part III.A.

246. HENKIN, *supra* note 244, at xxiv-xxvii; see also Lobel, *supra* note 195, at 1112 ("By the latter part of the nineteenth century, positivism had almost entirely replaced natural law theory in the international arena.")

For discussions on the demise of natural law as the basis for judicial decisionmaking and its subsequent replacement by positivism, see HENKIN, *supra* note 244, at xxiv-xxvii; Lobel, *supra* note 195; Dickinson, *I*, *supra* note 195; Jay, *One*, *supra* note 231.

247. For a list of the most important works declaring natural law, or *jus naturale*, to be the philosophical theory underlying international law, see sources listed in *supra* note 194.

248. The basic disagreement revolved around issues of divinity. In particular, several thinkers argue that the source of all laws is God and that these laws are "partly reflected in the law of nature, a body of permanent principles grounded in the Divine Order, and partly revealed in the Scripture." HENKIN, *supra* note 244, at xxiv.

In opposition to this school of thought were scholars like Grotius and Pufendorf, who, as rationalists, "derive[d] the principles of the law of nature from universal reason rather than from divine authority." *Id.*

in a philosophy of natural law.²⁴⁹ However, for various reasons²⁵⁰ natural law theory was slowly abandoned in favor of a positivistic theory of laws:

Although positivism has a number of different meanings and nuances, its essential meaning in the theory and development of international law is reliance on the practice of states and the conduct of international relations as evidenced by customs or treaties, as against the derivation of norms from basic metaphysical principles.²⁵¹

The rise of positivism produced two related and important beliefs: first, that rules not derived from a "definite source" were not really "laws" as that term is meant to be defined; and second, that international law is valid only insofar as sovereigns have expressly accepted its application.²⁵²

The most explicit manifestation of the belief that laws not derived from definite sources are somehow suspect, can be seen in the Supreme Court's decisions in *Hudson & Goodwin*²⁵³ and *Erie Railroad v. Tompkins*.²⁵⁴ In both of these cases, the Supreme Court not only formulated a very restrictive view as to the justiciability of federal common law, but also "dictate[d] a particular way of thinking about the authority of the federal courts. *Erie* [and *Hudson & Goodwin*] reject[ed] the notion that law can exist without being derived from some definite authority"²⁵⁵ Further, various codification movements throughout the nineteenth and early twentieth centuries betray a theoretical uneasiness with non-codified law—a product of the rise of positivism.²⁵⁶

Prior to World War II, international law was almost completely uncoded. As the theory underlying international law changed from a natural law basis to a more positivistic theory, the legitimacy and enforceability of non-codified, or customary, international law began to be questioned.²⁵⁷ In particular, scholars and judges began to view international law as constituting little more than "positive moral-

249. See *supra* part V.A.

250. See generally Jay, *One*, *supra* note 231; Jay, *Two*, *supra* note 242.

251. HENKIN, *supra* note 244, at xxv.

252. See generally JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* (1832); GEORGE W. F. HEGEL, *PHILOSOPHY OF LAW AND STATE* (1806).

253. 11 U.S. (7 Cranch) 32 (1812).

254. 304 U.S. 64 (1938).

255. Weisburd, *supra* note 224, at 1237 (emphasis added); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

256. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 403-07 (2d ed. 1985); JOHN HONNOLD, *THE LIFE OF THE LAW* 100-45 (1964).

257. Weisburd, *supra* note 244, at 1235-39; see also Dickinson, *I*, *supra* note 195; Dickinson, *II*, *supra* note 231.

ity."²⁵⁸ Although this view was not universally held,²⁵⁹ it most certainly affected the role that customary international law was allowed to play in many American courtrooms.

A further consequence of the rise of positivism was its effect on the role of state power in the international order. Put simply, if all laws must come from a definite source, and international law is nothing more than the custom of states,²⁶⁰ then international law is not law at all. As the belief in the inadequacy of international law to meet positivistic definitions of law spread, so did judicial attitudes about the impropriety of applying it to invalidate governmental action.

In the end, "[p]ositivism, gaining steadily in influence throughout the nineteenth century, resolved the balance in favor of sovereign power . . . and negat[ed] limitations on sovereignty."²⁶¹ As judicial attitudes about the power of state sovereignty changed to include beliefs in the nearly absolute power of the state, cases of international law began to take on political significance. Specifically, the judiciary began to view international law as merely a manifestation of political power, and thus was unwilling to apply that law in any way that derogated from the directives of the political branches.²⁶² In the end, the rise of positivism coupled with notions of state sovereignty forced the judiciary to change the way it viewed customary international law.²⁶³ The political branches were given

258. HENKIN, *supra* note 244, at xxvi. According to Henkin:

John Austin . . . [who] dominated jurisprudential thinking in the common law world in the 19th century, regarded a command emanating from a definite superior and punitive sanction enforcing the command as indispensable elements of law. He therefore relegated international law to the status of "positive morality."

Id.

259. See *supra* notes 212-18 and accompanying text (noting that courts deciding piracy and admiralty cases continued to give international law specific application).

260. HENKIN, *supra* note 244, at xxvi.

261. Lobel, *supra* note 195, at 1113; see HENKIN, *supra* note 244, at xxvi ("It was impossible to justify international law under state sovereignty theory, except as norms voluntarily accepted by sovereign states."); see also *In re Western Maid*, 257 U.S. 419, 432 (1922); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874).

262. See generally Charles D. Siegal, *Deference and its Dangers: Congress' Power to "Define . . . Offences Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865 (1988); Weisburd, *supra* note 224.

263. Because of the Constitutional provisions concerning treaties, these have been treated rather differently than customary international law and have thus received greater attention in the courts. However, the rise of positivism did have an impact even on the role of treaties in the domestic system. Specifically, Professor Jules Lobel has attributed to positivism the belief that federal statutes enacted later in time can supersede treaties:

International legal theory in the eighteenth century sought a balance between natural law absolutes and the need for flexible exercise of sovereign powers.

wide, and at times all-encompassing,²⁶⁴ discretion in their conduct of foreign affairs. In those few instances when cases of "proper" judicial disposition arose, the courts generally acquiesced to political branch direction.²⁶⁵

4. *The Growth of American Power.* A final factor which may have contributed to the relative demise of customary international law in America is of a purely pragmatic and political nature. In essence, the evolving position of the United States in the international system forced the judiciary to view international law at the beginning of the Republic in a radically different manner than it did when the United States became a world leader and military power.

In the early years following the Declaration of Independence, the newly declared United States found itself in a precarious position within the world community.²⁶⁶ Foreign policy in the early United States operated with hostile neighbors to the North and South (England and Spain), and an ever present awareness of the relatively weak military position of the United States on the international scene.²⁶⁷ Understandably, therefore, the judiciary was constantly monitoring the activities of American citizens and the American government to ensure that it acted within the bounds of international law.²⁶⁸ The political branches, aware of their precarious position, were equally wary not to violate the law of nations and thus give their enemies just cause for retaliation. In this way, the political and judicial branches acted in concert.²⁶⁹

However, as the economic and military might of the United States grew, and the political and military might of Spain and England in the Americas declined, the political need for adherence to international law evaporated. As the political need lessened, so the judiciary began to view international law and its restrictions on the expansive aspirations of the United States as an impediment to Am-

Positivism, gaining steadily in influence throughout the nineteenth century, resolved the balance in favor of sovereign power. By negating limitations on sovereignty, positivism supported both the power of a state to revoke treaties and the superiority of statutes over customary international law.

Lobel, *supra* note 195, at 1113.

264. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

265. See Trimble, *supra* note 86; Siegal, *supra* note 262.

266. LANG, *supra* note 233, at 67 ("In the decades following the Declaration of Independence in 1776, the United States found itself involved in several wars and presented with the possibility of others, even after the long struggle with Britain over independence was resolved with the Treaty of Paris in 1783.").

267. *Id.* at ch. III.

268. See generally cases discussed *supra* notes 205-215 and accompanying text.

269. See *supra* notes 231-245 and accompanying text.

erican ambitions and goals.²⁷⁰ Such factors "led courts to increasing protection of national interests at the expense of international ones."²⁷¹

5. *Countervailing Historical Developments.* Although this brief overview of the evolution of international political thought in the United States judiciary is forced to make generalizations about changing judicial attitudes in the nineteenth and twentieth centuries, it at least demonstrates that many different factors have contributed to the judiciary's unwillingness to apply customary international law. At the least, it serves to demonstrate that criticisms of customary international law based on historical evidence are suspect bases for rejecting a modern application of customary international law.

Further, there is substantial evidence that these factors are no longer legitimate reasons for refusing to apply customary international law. Traditional notions of absolute sovereignty have been discarded in the aftermath of the Second World War. Beginning with the trials at Nuremburg and continuing on with the founding of the United Nations, the United States has played the leading role in limiting the concept of the absolute rights of states.²⁷² The introduction of the "rule of law" into the international system is largely a product of American efforts and beliefs. Further, the United States has played a tremendous role in developing the current system of international law, creating a body of law that is largely a reflection of American interests and philosophies.²⁷³

Perceptions that international law impedes American interests no longer have any validity in practice. International law is currently slanted to favor those countries which emerged from the Second World War with increased resources and territories.²⁷⁴ Prohibitions against uses of force²⁷⁵ and the movements towards free trade and open seas have led to increasing power and riches for the United States. As such, judicial applications of international law to repudiate political branch action would not be detrimental to the interests

270. Dickinson, *II*, *supra* note 231, at 818-20.

271. Lobel, *supra* note 195, at 1114.

272. *Id.* at 1074.

273. *Id.*

274. There is little doubt that Western countries, specifically the United States, emerged from World War II with the power to reshape the international system. The hegemonic power wielded by the United States in creating the United Nations, opening up borders to trade, and guaranteeing the freedom of the seas, has resulted in an international system that aids American interests. As such, it is untenable to argue that international law would act, in any general or pervasive sense, as an impediment to American ambitions and interests.

275. U.N. CHARTER 2(4).

of the United States as an international actor.

B. *Theoretical Arguments*

Thus far, this Article has centered on historical discussions of the place of customary international law in American jurisprudence. It has shown that history alone is an inadequate basis for rejecting modern applications of international law. The only matters that remain to be answered are the *theoretical* objections which have been raised to a modern application of customary international law. In particular, some international law scholars have argued that its application is anti-democratic, or violates the institutional principles upon which this nation was founded.

1. *The Lack of Democratic Legitimacy.* It has forcefully been argued that customary international law has little or no place in the American legal system, and that its application to invalidate actions taken by either the legislature or the executive violates basic principles of American democracy.²⁷⁶ The attack against customary international law as being anti-democratic has been carried on mainly by Professor Phillip Trimble. Put simply, Trimble's argument is that

customary international law lacks "legitimacy" as a doctrine suitable for judicial application. The principal reason is that its formulation cannot be explained in a manner consistent with central features of traditionally accepted American political philosophy, and thus cannot be grounded in social values of the community subject to the law.²⁷⁷

Trimble's argument against the "legitimacy" of customary international law is largely based on the manner in which it is formed. As has been discussed above,²⁷⁸ customary international law is based upon state practice. Trimble believes that a law created from such a system cannot be reconciled with American political theory.

The basic tenet of American political philosophy, according to Trimble, is that the government was formed to be responsive to the people, and if it acts in a way that is not "responsible" or "accepted" by the country's citizens, then its actions are illegitimate.²⁷⁹ The fact that customary international law is created separately from the American political process is felt to be dispositive. The various aspects

276. See, e.g., Trimble, *supra* note 86, at 665; Weisburd, *supra* note 224, at 1268.

277. Trimble, *supra* note 86, at 672-73.

278. See *supra* notes 90 - 91 and accompanying text.

279. The role of the court in maintaining its legitimacy in the American political tradition is incumbent upon a recognition that "the power of a court is not unlimited, and that an important limitation on that power is the acknowledged necessity . . . to render reasoned decisions based on traditional sources of legal doctrine." Trimble, *supra* note 86, at 707 n.156.

of this argument have been explicated by Professor Charney:²⁸⁰

Many cases bearing on the U.S. foreign relations concern questions of international law. The mere fact that international law is involved may serve as a basis for judicial deference or abstention. International law is the product of a decentralized legal system without a legislature, an executive or a compulsory court system . . . These [factors] lend support to the view that U.S. courts should treat international law differently and more politically than they do other law. If it is not "real" law, deference to the executive branch would not breach the court's responsibility to find and apply the law.²⁸¹

Professor Trimble adds one more element of illegitimacy to customary international law by declaring that

[i]n this intellectual universe, the idea of customary international law encounters substantial problems, because at least some of the potential lawmakers, such as foreign governments, are neither representative of the American community nor responsive to it. *The foreign nature of these sources of legal obligation cannot be reconciled with American political philosophy* . . . [C]ustomary international law has no basis in popular sovereignty at all. Many foreign governments are not responsive to their own people, let alone to the American people.²⁸²

The final element of Trimble's illegitimacy argument is based on the fact that customary international law is not something that the American people have the opportunity to scrutinize and ultimately reject if they so desire. Laws in the United States are passed under tremendous public scrutiny and debate, and become "law" only when the popularly elected officials vote them into effect.²⁸³

280. Jonathan I. Charney, *Judicial Deference in Foreign Relations*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 98, 101 (Louis Henkin et al. eds., 1990).

281. *Id.* Professor Trimble obviously concurs with Charney's description of the problem when he concludes that customary international law lacks legitimacy and "should never [be applied] except pursuant to political branch direction." Trimble, *supra* note 86, at 716.

282. Trimble, *supra* note 86, at 721 (emphasis added).

283. The greatest danger, in Trimble's view, is that unlike treaties or statutes, developing "[c]ustomary international law . . . may not be known to the legislature, or even to most of the executive branch. In the most extreme case, a rule could evolve out of the practice of foreign nations while remaining entirely unknown to all or most of the United States government." *Id.* at 729.

This argument is ridiculous. For a norm of state practice to rise to the level of customary international law, it is generally regarded that the practice must be widespread (some argue nearly universal) and that states must follow that practice out of a sense of legal obligation. The argument that widespread international practice could secretly develop without the United States ever becoming aware of it until it was presented with the new "law" in a courtroom assumes a State Department ineptness that even its fiercest critics would have to be unwilling to consider.

In fact, it seems far more plausible that United States citizens will fall victim to "stealth statutes" passed by their representatives in the legislature than that the United

Thus, Trimble concludes that customary international law cannot be considered a legitimate standard for judicial review of political branch action because the law itself is opposed to American conceptions of democratic legalism.²⁸⁴

Although this criticism carries some theoretical weight, it fails to accurately account for the practical limitations placed upon the development of customary international law. In particular, customary law is subject to the same political process as a treaty, which every commentator agrees is law.

It is true that customary international law is based upon the consistent practice of states, some of which may be anti-majoritarian or anti-American in nature. Because of this, customary norms may hypothetically emerge which would be antithetical to United States interests.²⁸⁵ However, even if such a norm were to evolve, the United States may always avoid being obligated to follow it. A state is not bound by a customary norm "if it rejected that principle during the process of its development."²⁸⁶ Thus, barring of course Professor Trimble's "stealth norm," just as a nation may avoid accepting international obligations by refusing to ratify or sign a treaty, so too can it avoid an application of a customary norm by objecting to it during its creation.²⁸⁷

Further, the political reality of the current international order is that it is largely dominated by the interests of the United States. As such, it is highly unlikely that international law norms which could be applicable by United States courts will diverge from the interests of the United States.²⁸⁸ Thus, the conflict envisioned by the arguments above is arguably negligible. In reality, "[t]he United

States will be affected by "stealth" customary international law!

284. Trimble argues that:

[e]volving norms of customary international law do not receive the scrutiny that a proposed statute or treaty would receive within the executive branch, within Congress, or among concerned members of the American public. Denied this process, *these norms are not supported by the mythology of popular consent . . .* [Thus,] *a customary norm has a much weaker political foundation [than other laws] . . .*

Id. at 732 (emphasis added).

285. The importance and influence of the United States on developing international law would seem to preclude this possibility for the near future. Certainly, some customary norms may emerge which are not as favorable as the United States may wish, but the idea that an international norm could evolve into a binding norm of customary international law, while also being *antithetical* to the American "way of life," or "democracy," is highly unlikely.

286. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 n.38 (1984).

287. David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 969 (1986).

288. *Id.*

States continues to play a major role in international affairs and in the development of international law. With very few exceptions, the international law in force today is the product of U.S. efforts and is heartily endorsed by the United States."²⁸⁹ If the United States considered an international norm to be detrimental to its interests, it seems likely that the government would have objected to the creation of that law, and would thus be immune to its application. In cases where such opposition is missing, the wisest course of action would be to assume that the political branches chose not to opt out of the obligation, and that the law is effectively binding and should be applied by the courts in carrying out their "duty . . . to say what the law is."²⁹⁰

2. *The Absence of Judicial Restraint.* The second theoretical claim against customary international law is grounded in presuppositions about the role of the judiciary in the American democratic, federalist, and separated system of government. It has been argued that an application of customary international law against the government by the judiciary would constitute judicial "law-making." Such an argument makes basic assumptions, both about the role of the judiciary in the American system and the "non-traditional" nature of customary international law. The thrust of this attack incorporates aspects of Professor Trimble's "undemocratic" assault with more traditional criticisms of the judiciary as a non-democratic institution with very limited powers of review over the other branches of government.

The role of the judiciary in American society is a matter of widespread debate and disagreement. Generally, the debate focuses on the "non-democratic" nature of the judiciary, as opposed to the "democratic" nature of the elected branches.²⁹¹ The argument is usually phrased in the following manner: since we as a society believe in the importance and desirability of democratic decision making, we are naturally suspicious of the non-elected judiciary; paradoxically, we also believe that the judiciary is endowed with the responsibility for constraining the actions of the government. Thus, the only legitimate basis for making determinations as to when the elected branches should be left unchecked and when they should be

289. Charney, *supra* note 280, at 103.

290. *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803).

291. See Trimble, *supra* note 86, at 707 ("[T]he first and most basic question [concerning the power of the courts] is how to justify the law-making authority of unelected judges in a 'democratic' society."); Weisburd, *supra* note 224, at 1268 (claiming that the judiciary's disuse of customary international law "obviously reflects a belief that policy choices not fixed in the Constitution are properly left to the branches of the government directly responsible to the people . . ."). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1987).

constrained by the judiciary is found in the Constitution.²⁹²

In the Constitution, it is argued, the judiciary is directed to make decisions that affect the elected branches according to its role in the system of "checks and balances". For the courts to exercise their power to "check" political branch excesses, they must ground their decisions in principle, *i.e.*, in the Constitution.²⁹³

Principle requires the courts to justify their decisions with traditional doctrines. By requiring a principled decision, and by allowing the political branches to ignore unprincipled decisions, the courts are effectively limited from expanding their power beyond that originally envisioned in the Constitution. According to its critics, however, "no such inhibition applied to the development of customary international law."²⁹⁴ Customary international law changes without regard to principle; it is based on national self-interest.²⁹⁵ As such, an application of that law by the judiciary would be an expansion of power without principle, and thus illegitimate.

However, the belief that an application of customary international law is necessarily unconstitutional and outside the realm of

292. Weisburd, *supra* note 224, at 1237:

[T]he force of a common-law rule depends on the authority of the court that adopted it Moreover, if an institution is competent to promulgate rules only in certain circumstances, then those rules necessarily apply only in those circumstances . . . [and] only one source can authorize lawmaking by federal courts: The Constitution.

Id.

Professor Trimble offers the following argument:

[T]he power of a court is not unlimited, and . . . an important limitation on that power is the acknowledged necessity (for whatever reasons) to render reasoned decisions based on traditional sources of legal doctrine [Other] limitations on the exercise of judicial authority [are] . . . those inherent in the case-by-case approach, the availability of appeals, and the prospect of legislative reversal

Trimble, *supra* note 86, at 707 & n.156. Professor Trimble offers an example of the type of judicial decisionmaking that fails to base itself on what he calls "traditional sources of legal doctrine."

[I]f the courts order the executive branch to release a prisoner because it says his constitutional rights have been violated, the order would routinely be obeyed by government officials and accepted by the American political community. . . . On the other hand, if the court ordered the release of the same prisoner because the judge saw three crows cross the full moon the night before the decision, the order would probably not be obeyed *I believe that customary international law is more like the story of the crows than the explanation based on the Constitution.*

Id. at 718 (emphasis added). Exactly how this demonstration illuminates the discussion is never fully articulated.

293. Trimble, *supra* note 86, at 708 ("One of the most important limitations lies in a judicial commitment to render 'principled' decisions.").

294. *Id.* at 708-09.

295. *Id.*; see also Weisburd, *supra* note 224, at 1239-51.

judicial legitimacy is not as self-evident as the critics of customary international law seem to believe. Customary international law, as a source of law, is not anathema to the democratic system; neither is judicial review of political branch actions. This practice has been an accepted component of the United States system of government since the creation of the Union. Federal common law and the use of judicial review are both explicit examples of the legislative powers of the judiciary. To argue that the mere substitution of international common law for domestic common law somehow alters the delicate balance between Constitutional action and unconstitutional action is untenable.

Further, customary international law is only applicable to states which have chosen²⁹⁶ to have it applied to them. As such, the courts would only be finding and applying that law which the political branches are necessarily required to follow. Such review of political branch action would do much to restore the United States to the realm of legal conduct, and would help curb the excesses of individual administrations in their conduct of foreign affairs.²⁹⁷ Much of this Article has been devoted to showing how the Framers intended to have the judiciary keep the political branches in line with international law. Applications of that law would go far to returning the United States judiciary to its rightful place in the "separation of powers" system of government envisioned by the Framers.

Although Constitutional arguments have been leveled against an application of customary international law as being violative of the "separation of powers" doctrine, the most likely effect of such an application would be to return the government to its originally intended system of "checks and balances." However, it has been pointed out that

[o]ften, courts have good reason to hesitate when confronted with a claim based on international law. Many such claims involve foreign sovereigns or officials, or they raise difficult questions about the power of United States courts to regulate behavior beyond the national borders; and a judge might feel that to decide those issues would constitute a judicial intrusion into the United States' foreign relations.²⁹⁸

The wisdom of this declaration is evident. Although customary international law must be readily applied, there are specific instances where it would be violative of not only the United States' system of government, but also of common sense. As such, the political questions doctrine must not be stripped of its usefulness as a

296. Either through an express adherence or through neglect.

297. See *Alvarez-Machain v. United States*, 112 S. Ct. 2188 (1992).

298. Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269 (1991).

prudential tool allowing the judiciary to avoid deciding cases where it is either unequipped to decide, or would be invading upon the Constitutional realms of the other branches of government.²⁹⁹ Customary international law is not a suicide pact, and does not force the judiciary to alter governmental action in each and every circumstance. At the same time, however, the Constitution does not give the executive branch the power to ignore all international obligations without fear of judicial review.³⁰⁰

3. *Countervailing Arguments.* The preceding sections have shown that historical and theoretical objections to a modern application of customary international law are not dispositive. Since the judiciary is not precluded from applying customary international law by the Constitution, history, or political theory, the only remaining question to be answered is whether the judiciary should begin applying it. The answer is clearly yes, for a number of reasons.

First, there is the fact that much of international law since the Second World War has been created and fostered under the auspices, and to the benefit, of the United States. Judicial applications of international law have the possibility of continuing to solidify and evolve that process.

Second, the decisions of domestic tribunals, as evidence of state practice, can have a significant impact on the further development of international law.³⁰¹ Increased participation of the domestic judiciary in international law cases will aid in the development of international law in accordance with the interests of the United States.

299. See, e.g., Michael J. Glennon, *Foreign Affairs and the Political Questions Doctrine*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION*, *supra* note 280, at 107, 112-13:

To permit the Executive to proceed unencumbered by judicial review would work a radical reallocation of constitutional power. If the Court declines to intervene when the Executive poses a fundamental threat to the separation of powers, the Executive, not the judiciary, becomes the ultimate arbiter of the meaning of the Constitution. Judicial abstention in such circumstances is unjustified . . . [T]he political system is incapable of reestablishing an equilibrium of power, and the courts must step in to restore it.

Id.

300. See *id.* at 114 ("[T]he political question doctrine can serve to perpetuate, rather than alleviate, conflicts between the political branches and to impede the ability of the United States to speak with a unified voice."); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970). Professor Lillich believes very strongly in the impropriety of the widespread use of the political questions doctrine in foreign affairs cases: "[T]he courts must ultimately reassess the precedents by which international law . . . is accorded second class status. . . . If the Supreme Court is unwilling or unable even to approach this issue, then surely the possibility of an amendment to the Constitution requires discussion." *Id.* at 50.

301. See CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 91-103 (1965).

Third, United States attempts to foster the rule of law in other nations have been seriously hampered by this country's refusal to be bound by the very proscriptions it espouses. This country's return to international legitimacy, even if through judicial imposition, would go far to strengthening the rule of law in international relations—a development that can only support American interests.

Finally, the disproportionate effect that this country's actions have upon the development of international law is another factor compelling the judiciary to enforce legitimacy. The incorporation of this law into United States constitutional discourse could have important ramifications. Such an incorporation could simultaneously strengthen the body of customary international law and make it easier for other nations to identify and enforce this law. Once these laws are made explicit it will become more difficult for violations to occur.³⁰²

CONCLUSION

Alvarez-Machain represents a supreme failure of the United States judiciary. The reasoning behind the decision is inept and its holding is arguably immoral. However, its greatest failure can be found in its inability to grasp the consequences of allowing the executive branch to violate international law.

The law of nations was intended to be applicable to the United States. The Framers of the Constitution not only created the federal judiciary in large part to ensure its application, but the early Supreme Court did in fact apply it. The *Alvarez-Machain* Court's endorsement of executive power to ignore customary international law is antithetical to the purpose of an independent federal judiciary, and is also indicative of a larger problem—the withdrawal of the judiciary from issues that involve foreign policy. Essentially, the judiciary has abandoned its responsibility.

Difficulty in ascertaining customary law should not be a bar to its application. Courts have long been prepared to deal with non-codified law. Arguably, the greatest barrier to applying international law is the ignorance of the United States judiciary about the sources and effect of that law. Although this is obviously a difficulty, it seems to be professional cowardice to declare that it should be dispositive in determining the worth and validity of international law. If the United States judiciary is ignorant of international law, then education is the answer, not abandonment of the judicial function.

302. See Linda A. Stagno, *The Application of International Human Rights Arguments in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207 (1982).

In 1990, during the early days of the Gulf Crisis, President Bush addressed the Congress, proclaiming "a new partnership of nations" and predicting a time when "the rule of law supplants the rule of the jungle."³⁰³ Though President Bush obviously envisioned the United States as the motivating force behind his "new world order," subsequent actions by this country have seriously affected our credibility as a member of the "family of nations." An increased, but prudential, application of customary international law to review foreign policy actions would go far in returning the United States to a place of legitimacy in the international community. Only then will this country leave "the savage state" and return to the community of civilized nations.

303. Andrew Rosenthal, *Bush Vows to Thwart Iraq Despite Fear for Hostages; U.S. Won't be "Blackmailed,"* N.Y. TIMES, Sept. 12, 1990, at A1, A21; see also *Transcript of President's Address to Joint Session of Congress*, *id.* at A20.

